[27th May, 1842.]

The EDINBURGH and GLASGOW UNION CANAL COMPANY, *Appellants.*

SIR THOMAS GIBSON CARMICHAEL, *Respondent.*

Sale. — Terms of contract *held* not to import a sale of stone under land, but merely an agreement for compensation, in respect of a use of the land, whereby the working of the stone was rendered impracticable.

Interest. — Where possession of land was given for the purpose of forming a canal, under an agreement to pay compensation for the value of stone supposed to be under the land, so soon as the existence of the stone should be disclosed, *held* that interest was not due from the time of obtaining possession, but from the time at which the existence of the stone and its quality was ascertained.

Process. — It is not competent, after the record is closed, to ask by supplementary summons, for interest on the sums concluded for in the original libel.

Process. — *Reclaiming note.* — A defence to the competency of a supplementary action *held* to be sufficiently embraced by the prayer of a reclaiming note, so as to have effect given to it, notwithstanding the conjunction of the supplemental with the original action.

THE appellants being about to carry the line of their canal through the grounds of the respondent, he objected that a stratum of freestone worked by him in an adjoining quarry, extended under the proposed line, and insisted, under an agreement entered into, previous to the passing of the statute, authorizing the formation of the canal, that the line should be made so to diverge as to avoid the stratum. This difference was adjusted by a mutual agreement, bearing date 28th February and 3d March

1818, whereby the respondent agreed, among other things, that the canal should be executed according to the Parliamentary line, " provided always, that in case a face of rock shall be afterwards " found and wrought up to the canal, that the said Canal Com- " pany shall be obliged to turn the canal over the rubbish of said " quarry, leaving a proper access by aqueduct, for a road and " water level from the workings, or in the option of the said Sir " Thomas Gibson Carmichael, shall construct an aqueduct, so " as to allow the rock being wrought to the southward of it, if " it really exist, and shall pay the lordship of whatever stone the " canal shall cover, so soon as the adjoining workings prove that " it really does cover such rock, and impedes the operations of the " quarry." And the company, on the other hand, agreed to pay the damage occasioned by the making of the canal, in terms of the statute. " And the said Company are farther hereby bound " and obliged, in case at any time after the said line shall be ex- " ecuted, a face of rock shall be found and wrought up to the " canal, to turn, at the expense of the said Company, the canal " over the rubbish of such quarry, leaving a proper access by " aqueduct for a road and water level from the workings; or, in " the option of the said Sir Thomas Gibson Carmichael, and his " foresaids, to construct such an aqueduct as will allow of the " rock being wrought to the southward, and to pay to him and his " foresaids the lordship or worth to him for the time, of whatever " stone the canal may cover, to be ascertained by reference to " proper judges at the time, as soon as the adjoining workings " prove that it really does cover such rock, and impedes the " operations of the quarry; and the said Company are hereby " bound and obliged to guarantee the said Sir Thomas Gibson " Carmichael, and his foresaids, against all risk of water escaping " from the canal in its course from Kingsknows farm-steading " along by the pits made and marked on the said plan Nos. 1, " 2, 3, and 4, by sufficient puddling, and by a water tract along

" the north side of the canal, below the level of the water therein " and otherwise, and to carry the present run of water below " near the road side off in a westerly direction, and thereby re- " lieve the present quarry workings of that water, which in its " present easterly course finds its way into the quarry; all which " operations shall be done to the satisfaction of one or two neu- " tral engineers, mutually chosen by the parties."

On 3d December, 1825, the respondent having worked out the stratum on the north side of the canal, intimated to the appellants, " that in exercise of the option left to him by the agree- " ment, he declared his choice to be that the canal should re- " main in its present situation."

The parties again differed as to their rights, and in consequence a submission was entered into between them to Lord Newton. Under that reference the respondent claimed a lordship of 11s. per ton on the ordinary marketable price of the stone covered by the canal; the construction of an aqueduct and tunnel under the canal; of a mine to carry off the water from the new workings to be commenced on the south side of the canal; and of a bridge over the canal for the convenience of the quarries on either side. The arbiter remitted to Mr Jardine, an engineer, to report to him as to the necessity for a tunnel. The engineer reported on 22d January, 1830, and in consequence the arbiter ordered the different works required to be constructed, and this was done in the course of the reference. During this period, the respondent opened the quarry on the south side of the canal, and, to an extent disputed by the parties, discovered the existence of stone on that side. Before the reference was concluded, Lord Newton died, and it thereby terminated.

In November, 1833, the respondent brought an action against the appellants, in which he set forth, that the workings on the south side had discovered stone to be under the canal between two fixed points on a plan marked A and C; and concluded, that

the appellants should be ordained "to make payment to the pursuer "of the sum of L.20,000 sterling, or of such other sum, less or "more, as shall be ascertained to be the amount of the lordship "and worth to him for the time, of such part of the said rock "covered by the canal as extends along the whole length of the "workings of the pursuer's quarry, on the north bank of the "said canal, to the extent in length comprehended between the "said points A and C, laid down and defined in the said fore-"said plan; or at least, of the sum of L.10,000, or such other "sum, less or more, as shall, in like manner, be ascertained to "be the amount of the lordship or worth to the pursuer for the "time, of such part of the said rock covered and extending as "aforesaid, as the adjoining workings to the south of the canal "have already proved to exist, in terms of the said agreement; "reserving always to the pursuer his claim and right afterwards "to prosecute and follow forth all actions and proceedings for "the lordship or value of the remainder of the rock covered by "the said canal, in terms and in virtue of the said obligation "undertaken by the said Company, and also reserving all other "claims and demands competent to the pursuer, under and by "virtue of the agreement before narrated."

After defences had been put in, condescendence and answers were ordered, and to their answers the appellants subjoined the following pleas in law: —

"1. As neither the quantity of stone or rock covered by the "canal, nor the price at which it would sell, if quarried and ex-"posed to sale, have been specified by the pursuer, there are no "grounds upon which either of the demands made by him in his "summons can be sustained.

"2. The defenders having been always willing and ready, as "soon as the extent of rock or stone covered by the canal should "be ascertained, to fulfil their part of the contract or agreement

" as to the payment of the lordship or per centage, the present " action is altogether unnecessary.

" 3. As the payment of any lordship or per centage upon the " selling price of the stones necessarily implies the right of quar- " rying and selling such part of these stones as the defenders " may find convenient, the pursuer, even if he could condescend " upon the amount of his claim, would be bound, before deman- " ding payment of his lordship or per centage, to give proper " and sufficient security, that the defenders, when they find it " convenient to remove the rock or stone, for which they are to " pay the lordship or per centage, should not be interrupted in " doing so by future heirs of entail, or other third parties.

" 4. Generally, the pursuer is not entitled to decree, in terms " of his libel."

Before the record was closed, the parties consented to a remit to Wood, an engineer, to report " upon the questions of fact in " the case." Under that remit Wood, in 1838, reported, —

" 1. That the rock on the north side of the canal, from the " point marked C on the plan herewith produced, and signed by " the reporter as relative hereto, westward to the point marked " B on said plan, was exposed by the workings of the quarry *on* " *the* 16*th day of November*, 1825.

" 2. That a tunnel was made through the rock left under the " canal, from the rock on the north side to that on the south " side thereof, and a shaft was sunk down from the surface to " this tunnel, and consequently a portion of the rock, equal in " dimensions to the size of the tunnel and shaft, was exposed on " the south side of the canal, on the 13th day of August, 1831.

" 3. That the whole rock on the south side of the canal, lying " between the two points marked A and D upon the foresaid " plan, was exposed by the workings on the south side of the " canal, on the 31st day of December, 1836.

"4. That the value of the rock left underneath the canal from "the line marked C D to the line marked A B on the foresaid "plan, where the fall of the said rock has been exposed on both "sides of the canal, after making allowance for the extent of rock "excavated by the tunnel, is L.3930, 4s. 6d. sterling."

The meaning of his report Wood explained, in a letter to the parties, which he appended to his report, to be as follows:—"The "question is not simply as to the time when the sum brought "out by me is payable, whether on the 16th November, 1825, "or any other bygone period; the question is as to the mode of "assessing the value of the rock under the canal, according to "the terms of the agreement, — as to whether Sir T. Carmichael "is to be paid the value of the rock left under the canal at the "sale prices of the quarry, due on some day prescribed by the "agreement, and to be determined by the Court; or whether "he is to be paid such a sum as would be equivalent to the "value of the rock to him, or the mercantile value, on such day. "In the former case, the sum brought out by me would be the "sum payable to Sir T. Carmichael on the day which the Court "shall decide that sum to be due or payable, and it will be for "the Court to decide whether any or what interest is payable, — "no interest being considered by me in the sum named. In the "latter case, viz., if the Court should determine that the mer-"cantile value should be paid to Sir T. Carmichael, the said "sum will not apply at all; it will, I presume, involve a very "different mode of calculation, as it will comprehend the ques-"tion of what value the rock under the canal was to Sir T. "Carmichael, considered in connection with the interruption "interposed, and loss occasioned to the workings and sales of "the quarry by the rock under the canal, there being other rock "to work. The two cases would only be the same if, when the "workings reached the rock left under the canal, there was no "other rock to work, then the sum brought out by me would

" apply to both cases; but there being other rock to work, if the " mercantile value to Sir T. Carmichael is to be the sum paid, a " different mode of estimate of the value will, it appears to me, " have to be made, — the value by me not applying at all to " such a case."

Objections were taken by the appellants to this report, in which they insisted, " that the mercantile value of the worth, for the " time, to the pursuer, of the rock covered by the canal," ought to be ascertained.

On advising these papers, and hearing counsel, the Lord Ordinary, (Jeffrey,) on the 22d February, 1839, pronounced the following interlocutor, adding the subjoined note: — " The Lord " Ordinary having heard the counsel for the parties on the *in-* " *terim* report, or award of the judicial referee, and made avi- " zandum, — approves of the said report or award, in so far as " it fixes and ascertains the value of the rock or stone under, or " so nearly adjoining that part of the canal referred to in the " said report, as to be incapable of being wrought or quarried " with safety to the said canal; — Finds that, according to the " just and true purport and meaning of the agreement of Feb- " ruary and March, 1818, the Canal Company is bound to pay " to the pursuer the ascertained value of the said rock or stone, " as if they had been purchasers thereof, at and from the period " when its existence and position was ascertained by the ex- " posure of its face (or vertical surface) in the course of the " pursuer's workings in his adjoining quarries; but that they are " not bound to pay the whole of the said ascertained value in one " sum, and as if the entire mass of the said rock had been actu- " ally worked out and removed on the day when they are thus " held to have become purchasers of the same, but only at such " periods, and by such instalments, as the pursuer might have " realized by working out the said rock for the market, accord- " ing to the ordinary rate and course of sales from his said

" quarries at the time, and on the supposition that the whole of " the said sales had been supplied from the rock so appropriated " by the said Canal Company. And before farther answer, " appoints the cause to be enrolled, that parties may explain in " what terms decree should now issue in conformity with the " preceding findings, or what other proceedings are yet to be " had in the cause."

" *Note.* — The defenders seemed at one time disposed to maintain, " that nothing more should be awarded to the pursuer, as 'the lord- " 'ship or worth to him' of the rock in question, than the actual " damage or loss he might suffer, either by not having enough of " other stone left to supply the demand, or by being put to extraor- " dinary expense in working such other stone; and that while he had " abundance of other stone easily accessible, he had no claim at all. " But the Lord Ordinary has no doubt that this view is untenable, " and that the defenders are to be dealt with as purchasers, and, in " fact, would have been liable as such, even if they had not entered " into the specific agreement libelled on. They necessarily " became purchasers of the *solum* required for their canal and its " banks, towing paths, &c., and consequently of the minerals under " that ground, — for the full value of which they were consequently " bound to indemnify the owners, as parties whom they on the one " hand had compelled to sell, and who were entitled on the other to " take the full benefit of the need these adventurers for gain " happened to have for their property. The words of the agreement, " accordingly, fully express this meaning, and indeed are capable of " no other interpretation. The Canal Company required this un- " wrought stone just as indispensably for the casement and support " of their canal, as if they had required to work out and pay for an " equal quantity to face up their banks, basins, or locks, in the " vicinity, and were no more entitled to deprive the owners of the " one article than of the other, without paying its full value. It might " be a piece of good fortune for the owner of the stone, that so good " a customer was thus obliged to deal with him, but it was a piece of

" good fortune of which he was fairly entitled to take advantage; " and as the canal adventurers could scarcely do without his com- " modity, they have reason perhaps to be thankful that he only " stipulated to be paid at the ordinary market price. The Lord " Ordinary has no doubt, therefore, that 'the lordship or worth to " 'him' of the stone in question, must be taken, (in the plain sense " of the words,) to mean the value or price which it would have " brought at the time, if sold for the more ordinary purpose of being " wrought out and employed in buildings. But, on the other hand, " as that price would not have been realized at once if drawn in from " such ordinary workings, it seems reasonable to limit the liability of " the defenders to what they would have had to pay if they had re- " moved the whole stone, at the quickest rate of working actually " practised in the adjoining quarries."

The appellants reclaimed against this interlocutor, but the Court adhered to it by an interlocutor dated 15th November, 1839. Subsequently, the parties agreed to close the record, and that was accordingly done by an interlocutor on the 23d November, 1839.

Parties were then heard before the Lord Ordinary on the reserved points of the cause, when the respondent urged a claim for interest on the money that might be found due to him. This was objected to by the appellants on several grounds, and among the rest, that the conclusions of the respondent's summons would not warrant a decree for interest.

On the 28th November, 1839, the Lord Ordinary pronounced the following interlocutor:—" Having heard parties' procura- " tors upon the remaining points of the cause, and especially on " the motion of the pursuer for an interim decree for the sum of " L.3930, 4s. 6d., before farther answer, appoints the defenders, " within twenty-one days from this date, to consign in the bank " of the British Linen Company, the said sum of L.3930, 4s. 6d. " to general account of the pursuer's claims, — reserving *hinc*

" *inde* all questions as to the defenders' liability in interest,
" whether past or future, upon the sum so consigned, subject to
" the future orders of the Court or Lord Ordinary in this cause;
" and farther appoints the said parties to give in mutual minutes
" of debate, — 1st, On the claim of interest generally on the part
" of the pursuer; — and 2d, On the defenders' objection to the
" sufficiency of the pursuer's title to grant them a valid discharge
" or secure right to the stone mentioned in the agreement."

The respondent gave in the minute ordered by this interlocutor, and claimed interest on L.3930, 4s. 6d. from 16th November, 1825; and to obviate the objection to the conclusions of his summons, in case it should be sustained, he, in January, 1840, brought a supplementary action by a summons, which set forth the proceedings in the original action, including the interlocutor ordering the minutes of debate, and proceeded in these terms:—

" That, accordingly, minutes of debate have been prepared
" and lodged, in which the pursuer's right to interest generally
" is, *inter alia*, argued; but the pursuer is advised, that though
" he succeeds in his claim of interest, he will still have to combat
" the technical objection raised by the defenders on the wording
" of the conclusions of the original summons, and that the objec-
" tion is capable of being removed by a supplementary summons,
" in which an express conclusion for interest may be inserted:
" Therefore this present supplementary summons, and the action
" to follow hereon, ought and should be remitted to, and con-
" joined with the foresaid original action at the instance of the
" pursuer: And the said Edinburgh and Glasgow Union Canal
" Company ought and should be decerned and ordained, by de-
" cree of the Lords of our Council and Session, to make pay-
" ment to the pursuer of the due and lawful interest of the said
" principal sum of L.3930, 4s. 6d., which has been found by the
" Court to be due to the pursuer as the amount of the lordship
" or worth to him for the time of the foresaid portion of rock

" reported on by Mr Wood; and also of the due and lawful in-
" terest of whatever other or farther sum or sums may yet, in the
" course of the said original action, or of the said original action
" and this supplementary action when conjoined, be found by the
" Court to be due to the pursuer, as the amount of the lordship
" or worth to him for the time of the remaining portions of the
" rock belonging to the pursuer covered by the canal, embraced
" by the conclusions of the said original summons; such interest
" to begin to run from and after the 16th of November 1825, or
" from and after such date or dates as our said Lords may fix
" and determine, and to continue so to run until payment; re-
" serving always to the pursuer his claim and right afterwards
" to prosecute and follow forth all actions and proceedings for
" the lordship, or value of the remainder of the rock covered by
" the said canal, in terms and in virtue of the said obligation
" undertaken by the said Company; and also reserving all other
" objections and demands competent to the pursuer under and
" by virtue of the agreement before narrated."

This supplementary action did not do any thing to obviate the objection as to want of parties.

On the 25th February, 1840, the Lord Ordinary reported the original cause to the Court upon the minutes of debate, and, at the same time, he issued a note which, as to the question of interest, was in these terms: —

" *Note.* — The Lord Ordinary's present impression is in favour of
" the pursuer, on both the points discussed in these minutes. But,
" as both appear to him to depend very much on what may be thought
" to be the true import and effect of the final interlocutors already
" pronounced in the cause, he has thought it best to report it with-
" out a judgment, that the Court may at once determine, and, if
" necessary, explain on what grounds they adopted these interlocu-
" tors, and in what sense they meant that they should be enforced.

" For his own part, the Lord Ordinary has no hesitation in saying,

" that by finding that the defenders 'must pay the ascertained value " 'of the rock or stone in question, as if they had been purchasers " 'thereof,' at a certain date; he certainly meant neither more nor " less than that they did become purchasers as at that date; and " purchasers too, who must be considered as having received delivery, " and taken full possession of the subject, at or before that time. " Till the pursuer declared his election to let them rest their canal " permanently on the rock or stone, which he might otherwise have " quarried, and to accept from them the price of that stone in return, " there were, to be sure, no grounds for holding that there was any " sale or purchase of that stone; because, if he had chosen the other " alternative, the canal must then have been shifted to another place, and " the whole stone left at his disposal, as freely as if no canal had ever " come into the neighbourhood. But from the moment when he " made his election to take the price of the stone, and make it finally " over to the defenders, to be used either as the permanent basement " of their canal, or for any other purpose they might prefer, it is " thought to be clear that the agreement which, up to that time, was " contingent or ambiguous, passed finally, and resolved itself into " an ordinary purchase and sale, under which the commodity became " the property of the buyer, and the price became due to the seller. " In these circumstances, the Lord Ordinary, in using the words re- " ferred to in his interlocutor, meant certainly, not that the transac- " tion with the defenders was analogous to a sale, or that, though not " really purchasers, they should be dealt with as if they were, but simply " that though the nature of their contract was for some time in sus- " pense, and it was uncertain what character it might ultimately " assume, it necessarily passed at once into a completed sale, as soon " as the existence of the subject had been ascertained, and the option " declared by the owner to take the market price for it; and to leave " it, for that price, with the defenders.

" But if it was clearly a sale from that period, it is thought to be " at least equally clear, that it was a sale then consummated or com- " pleted by delivery; and consequently a sale under which the price " became instantly exigible. The seller not only then renounced " and made over all right he had to the possession of the subject, and

" the buyers acquired all that right, but they thenceforward held, on " the precise title of that contract, all the possession and occupancy " which he could give as proprietor; and, in fact, the only use or " occupancy, for the sake of which they had agreed to pay the full " marketable value of the subject. From that moment they had un- " doubtedly a complete right to exclude him, and all his representa- " tives from any use of it, in all time to come. The pursuer contends, " indeed — the Lord Ordinary thinks most rashly and unadvisedly, — " that they only acquired right to use it as the basement of their " canal. He will probably find that plea, which he has no intelligible " interest even to maintain, most injurious, if not fatal, to his argu- " ment on the second point discussed in the minutes. But it is not " perhaps very material to that now under consideration; since it " would still be true that the bargain, whatever it was, was then " completed by full delivery and possession of all that was stipulated " for or required, as the counterpart of the price or consideration; " and if the price is payable now, (which is not disputed), it must " have been equally payable in 1825, the time at which the contract " was irrevocably fixed by the pursuer's election, and ever since " which, the defenders have held possession, on the same titles and " security on which they hold it at this day.

" The only difficulty the Lord Ordinary had, was in fixing the " precise date when this payment should be held to have been due. " Upon principle, he thinks it might have been carried back to the " day when the pursuer declared his election, that the settlement " (possession being already taken) should be by payment of a price. " But as it was not then absolutely certain that there was any subject " in existence (that is, any stone actually under or close to the " canal,) to which the contract could apply, it was thought better to " take the time when it was ascertained that there was such a sub- " ject by its being laid bare in the course of the workings on the " north, and the consequent stoppage of those workings if the canal " was to remain where it was; and as the interval between these two " periods was but of a few months, there was the less difficulty in " taking the last of them as the criterion. The Lord Ordinary, how- " ever, thinks it plain, that there is no ground for holding that the

" contract should not be held completed, till the stone was laid bare " on both sides of the canal. That might be necessary to ascertain " the *quantum* which was to be paid for the loss or renunciation of " it, but not at all for the final completion of the contract, to pay " whatever might turn out to have been then made over; or for " settling the point that the canal was to continue over the stone in " consideration of a price to be paid; which price, it is thought, " must be due from the moment the workings were stopped, for " which it was to be an indemnification, and the site of the canal " secured, which was the final confirmation of the possession.

" But if this be the just view of the transaction, as settled by the " true meaning of the former interlocutors, it is thought to admit of " little doubt, that interest must be found due from the period when " the contract was thus completed, and consummated by delivery. " The right may not arise *ex mora*, or from any precise contract, but " rests on that plain and palpable equity, which has authorized or " rather necessitated the supposition, — or fiction it may be, — of a " *quasi* contract, or implied contract, to this effect: on that obvious " rule, in short, of common justice, which will not allow a man to " hold and profit by a property which he has taken as a purchaser " from another, without paying the annual or termly interest of the " stipulated price, as a *surrogatum*, or compensation, for the annual " or termly use or profit he has had of the property, while the price " was, however unavoidably, withheld. On this ground, accordingly, " it is settled that the purchaser of a land estate, who enters into " possession, must ultimately pay the interest on the price from the " time of such possession, though the actual payment may have been " necessarily delayed, either from the want of a sufficient title, or the " difficulty of liquidating its just amount, by actual valuations, or the " decree of some appointed referee. There is, and there can be, " nothing in such considerations to defeat the plain principle, that a " purchaser cannot have both the use and profit of the thing pur- " chased, and of the price due for it, for one and the same period; " and that he must therefore pay interest on the price, for all the " period that he has actually had the enjoyment of the thing pur- " chased. Nor is the application of this principle to the present

" case, in the Lord Ordinary's view of it, in any degree doubtful. " He has already said, that the defenders got full right to the stone " in question in 1825; and, undoubtedly, they have ever since had all " the possession of it which they contemplated, when they agreed to " pay its full value to the pursuer. The Lord Ordinary sees no " reason to doubt that they might then have worked out the whole " of it for sale, if they had chosen to expose their canal to the peril " of such an operation; and, in their present minute, they themselves " assume and maintain, that they had undoubtedly such a right. If " they did not work it out accordingly, it could only be because they " thought they had more profit and advantage from it in another " way; that they benefit, not less but more, by their keeping and " using the subject of their purchase themselves, than if they had " sold it again to other parties. But, if this be plain and undeniable, " it is equally undeniable that they have ever since had all that pos- " session and enjoyment of their purchase, which imposes on them " the necessity of accounting for the interest or natural proceeds of " the price, for the profits of which also they could not possibly have " any maintainable claim."

On the 21st May, 1840, the Court pronounced the following interlocutor: — " The Lords having, on the report of Lord " Jeffrey, Ordinary, considered the mutual revised minutes of " debate for the parties, and whole process, and having heard " parties' procurators, — Find that the defenders are bound to " pay to the pursuer, personally and individually, the interest on " the sum of L.3930, 4s. 6d., which, in terms of Mr Wood's " interim report, is the ascertained value of the rock or stone " already reported on by him, and that from and after the " period when the existence and position of the said rock or " stone was ascertained by the exposure of its face (or vertical " surface) in the course of the pursuer's workings in his adjoin- " ing quarries, which period is fixed by the said report to have " been the 16th November, 1825; but this always under and

" subject to the qualification as to paying the said sum of " L.3930, 4s. 6d. by instalments, contained in the interlocutor " of 22d February, 1839, since adhered to by the Court; and " before answer as to the question of the pursuer's right to up- " lift and receive payment personally and individually of the " capital of the said sum of L.3930, 4s. 6d. itself, appoint the " heirs of tailzie of the entailed estate of Hailes to be called into " the field by a declarator, or otherwise, by one or both of the " parties to this process, so as to afford them an opportunity of " appearing for their interest, and supersede farther considera- " tion of the said question till that be done. *Quoad ultra*, re- " mit to the Lord Ordinary to do farther in the cause as to him " shall seem just, and particularly to fix the precise date or dates " from which, under the foresaid qualification in the interlocutor " of 22d February, 1839, interest on the foresaid sum of L.3930, " 4s. 6d., or the instalments thereof, commenced to run against " the defenders, and to decern for said interest in favour of the " pursuer."

On the 25th June, 1840, the Lord Ordinary pronounced this interlocutor: — " The Lord Ordinary, in respect of the minute to " that effect, holds the record closed in the supplementary action " upon the summons, defences, and pursuer's minute of debate; " and having heard parties' procurators, conjoins the said sup- " plementary action with the original action at the instance of " the pursuer against the defenders." The interlocutor then repeated the finding of the Court as to the payment of interest, and then proceeded thus: — " Farther, finds in the said conjoined " actions, that by reference to the quarry books and other evi- " dence in process, it appears, that giving full effect to the fore- " said qualification, the said sum of L.3930, 4s. 6d. was payable by " the defenders by two instalments, the first of L.2509, 5s. 10d. " on 1st August, 1826, and the second of L.1420, 18s. 8d on the " 2d February, 1827: Finds, accordingly, that the pursuer is

" entitled, personally and individually, to payment from the de-
" fenders, of legal interest on L.2509, 5s. 10d., part of the said
" sum of L.3930, 4s. 6d., from the said 1st of August, 1826, and
" on L.1420, 18s. 8d. being the balance thereof, from the 2d of
" February, 1827, both until paid; and decerns and ordains the
" defenders to make payment to the pursuer, personally and in-
" dividually, of said interest, accordingly, along with the expense
" of extract, and allows this decreet to go out and be extracted
" *ad interim.*"

The appellants reclaimed against this interlocutor by a note, which prayed the Court "to alter the interlocutor submitted to
" review; to find that the defenders are not liable in interest, as
" found by the said interlocutor; and in particular, that they are
" not liable in interest prior to the period when the amount of
" the principal sum due by them shall be finally ascertained; or
" otherwise, to alter or modify the findings in the said interlocu-
" tor, or to do otherwise in the premises as to your Lordship
" may seem proper." On the 11th July, 1840, the Court adhered to the interlocutor of the Lord Ordinary.

The appeal was taken, with leave of the Court below, against the interlocutors of 22d February, and 15th November, 1839, 21st May, 25th June, and 11th July, 1840, without awaiting discussion of the questions as to the necessity for the heirs of entail being made parties; but the only grounds argued at the bar were, the liability to interest, and the competency of the decree for interest in the shape of the pleadings.

Mr Solicitor General, and Mr Bruce, for the appellants.—I. The footing upon which the Court below has found the respondent entitled to interest is, that, by the agreement between the parties, he sold to the appellants the stone under their canal, giving the agreement the character of a sale. The terms were specifically agreed upon, but the payment of interest was

not one of them. Interest, no doubt, is due in many cases *ex lege*, but where parties reduce the particulars of their agreement to writing, it is not competent, in this respect, to go beyond the terms of the agreement, *Ersk.* III. 3, 75; Wallace *v.* Geddes, 1 *Sh. Ap. Ca.* 42.

II.—But there is nothing in the terms of the agreement which at all sanctions giving the character of a sale to it. The agreement did not give the appellants a right to work the stone, neither was it the object of the parties that it should do so; indeed, if the respondent had adopted the first alternative of the agreement, the stone would not in any way whatever have formed matter for discussion between the parties; but, even under the second alternative, which the respondent did adopt, all that the transaction amounted to was a permission to the appellants to carry their works over the stone, paying the respondent a compensation for so doing.

III.—Though the workings on the north side of the canal discovered stone, as at November, 1825, it did not necessarily follow, that this stone extended to the other side of the canal, between the points C. and B., as reported on by Wood; and until this was discovered, there was no *data* for ascertaining the sum which the appellants ought to pay the respondent. That, as reported by Wood, did not occur until the year 1836, three years after the action had been brought; and Wood's report, which is alternative in its nature, and no way ascertaining the exact sum to be paid, but leaving that to the judgment of the Court, was not made till 1838. At the date at which the action was brought, there was nothing therefore to warrant it in regard to the principal sum, and still less in regard to the interest, so that there was not only no contract for the payment of interest, but no *mora* in the payment of the principal which could

make interest due *ex lege*. The appellants have not had any profitable occupation of the stone, neither have they deprived the respondent of such occupation. The working of the quarries, and the payment of rent by his tenants, has not in any way been disturbed by the operations of the appellants; there is the absence, therefore, of every ground on which interest is made payable.

IV. — The action originally brought did not contain any conclusion for interest, it was not therefore competent, under it, to make any decree for payment of interest. This defect might have been cured by amendment before the record was closed, but it was wholly incompetent to do so by supplementary summons after the record had been closed. Interest is merely an accessory of principal; it could never be allowed that a party should bring separate actions for the two; if not, then the proper course here was by amendment of the libel, not by supplementary action. This was to evade the terms of 6th Geo. IV. cap. 120, the object of which is to prevent any alteration of the record after it is closed.

Mr Pemberton, and Mr Andrews, for the respondent. — I. The true meaning of the agreement is, that the rock under the canal was to be held as having come into the market so soon as the workings on the north side had come up to the canal and discovered it: that it should thus be considered as sold to the appellants; and that the price should be paid in the same manner as if the stones had been worked and sold to the public, that is, that it should be paid for at the time at which it could have been worked. These periods have been held by the Court below to be, August 1826, and February 1827. There is no other character that such a transaction can bear than that of a sale. The use the appellants intended to put the stone to cannot make

any difference in the nature of the agreement with the respondent, or in his rights under it.

II. It was not necessary to contract, in the agreement, for the payment of interest; from the period at which the appellants became purchasers, and obtained possession, interest became due *ex lege* as a surrogatum for the use and enjoyment of the subject sold, without any regard to breach of contract or *mora*; 1 *Bell Com.* pp. 648, and 649, § 30; *Ersk.* III. 3. 79; Wallace *v.* Oswald, 3 *Sh.* 525. But even under the agreement interest is stipulated for; the respondent is to be paid the true worth; but he will not be paid the worth unless he obtain the interest as well as the capital sum.

III. If interest be payable *ex lege* from the date of obtaining possession, without reference to *mora*, it can make no difference when the exact amount of stone was discovered; the purchaser is not the less in the enjoyment, in the meanwhile, of the possession for which the interest is given as an equivalent.

IV. No objection was taken in the Court below to the competency of the supplementary action. The opinion of the Inner House, without which appeal is incompetent, was never taken upon that question; the objection is not even raised in the printed case for the appellants to this House; it is now made at the bar for the first time, and cannot be entertained, but it is capable of two answers, 1*st*, If interest is due *ex lege*, by implication, from the nature of the contract, and is then an accessory of the principal, it was sufficiently embraced, and might competently be decerned for under the terms of the original action. 2*d*, If the right to interest be separate and distinct from the right to principal, to be concluded for separately, then the supplementary action was for matter distinct from that embraced

by the original action, and is not liable to any objection founded on the 6th Geo. IV. cap. 120.

Mr Solicitor General, in reply.—It was not possible for the appellants, under the statute, to have reclaimed against the conjunction of the actions; but, moreover, the conjunction was unimportant; it was the finding of liability for interest which was the matter complained of, and that is sufficiently embraced by the prayer of the reclaiming note.

[*Lord Campbell.*—Can interest be given without a conclusion for it?

Lord Brougham.—Might not your reclaiming note have asked the Court to assoilzie from the supplemental action?]

It would not, perhaps, have been informal, but it would not have been usual.

[*Lord Brougham.*—Would it not have been competent for you to have asked the Court merely to alter the interlocutor?]

Certainly, but we could not have asked them to recall it in respect the action was incompetently conjoined.

[*Lord Brougham.*—You don't ask generally to alter, but go on to ask particular findings.]

But it is not at all clear, that under the 48th Geo. III. it is incompetent to appeal against an interlocutor which has not been reviewed by the Inner House. The 15th section, no doubt, says there shall not be appeals against interlocutors which have not been reviewed by the Inner House, but that is to qualify the part of the same clause as to appeals against interlocutors with leave of the Court; and, on the other hand, the proviso in the same clause declares, that when an appeal is taken it shall be competent to appeal against all or any of the interlocutors that may have been pronounced.

[*Lord Cottenham.*—My impression is, that the effect of that proviso was decided in this House within these two years back.]

EDINB. AND GLASGOW UNION CANAL CO. *v.* CARMICHAEL. — 27th May, 1842.

Mr Anderson, amicus curiae.—It was decided in Jeffrey *v.* Brown.

LORD BROUGHAM. — My Lords, In this case I cannot concur in the interlocutors which have been pronounced in the Court below, either that of the Lord Ordinary, or the interlocutor adhering to it. We do not know the grounds on which the Court adhered to it, except that we have a very full and able note of the learned Judge, stating the grounds of his interlocutor; and we must assume that those arguments were adopted by the Court in affirming it.

Now, my Lords, it appears to me, that his Lordship and the Judges below must have proceeded upon the assumption of this being a contract of sale. I cannot liken it to a sale at all. It appears to me to be a bargain of this description: —

Leave is given by the owner of the land to the Canal Company to carry their canal over his ground, the consequence of which would be to deprive him or his lessees of the means of taking the stone under the canal; and in consideration of that permission, the Canal Company had agreed to pay him an equivalent for that loss. The natural and fair mode appears to have been adopted for that purpose, namely, that a lordship should be paid upon the stone, which, but for the working of the canal, the owner or his lessees might have gotten and sold. That is the nature of the transaction, and not a sale; there has been no sale of the ground or of the stone. If there had been a sale by the owner of the ground of the stone, and possession given of the stone in virtue of the sale, then might have arisen the question, though hardly a question, the possession vesting in the company, whether the party in possession should pay to the party giving up possession, the rents and profits during that time, estimated by the interest of the money. That does not appear to be the nature of the transaction, but it is a transaction of the other description to which I have referred.

That disposes of the question of interest, because, unless there was a contract to pay the money at a given day, which had passed by without payment, no claim of interest could have been competent to the party. Now, what is the time at which interest upon the payment claimed is said to be due? Certainly not before 1836. I should say not before Mr Wood made his report, which would bring it to November, 1838, when the L.3930 was first ascertained; and the only doubt I had in my mind was, whether between that period and the time of paying the money into Court, interest was due; but upon the best consideration I have been able to give to it, it does not occur to me that there is any such laches or default upon the part of these parties, as entitles the owner of the ground to interest during that period. Application was made in the usual way to have the money paid into Court; it is not pretended that that was resisted, nor is it pretended that the application was made during any part of the previous years before the year when the money was paid. It stands thus. It is known that the time the money was due, was the date of Mr Wood's report, or the end of 1838. And application was first made for it to be paid into Court towards the latter end of 1839, and payment was then made into Court. In such circumstances, it does not appear to me that interest can be charged upon the party, independently of the other question to which it is necessary to advert upon the pleadings.

It seems to be pretty clear in a case of this description, that no demand having been made in the original summons for interest, an amended summons would be necessary, but the party allowed the time to elapse, within which it was competent to him to amend; he allowed the record to be closed a considerable time before the supplemental action was brought. After the money was paid into Court, he brings his supplemental action to cure that defect. I consider the supplemental action an evasion of

the act of Parliament, and that it was not a proceeding competent to the party. This ground of itself would be sufficient, independently of the merits.

Some doubt appears to be endeavoured to be raised upon the interlocutor of the 25th of June, 1840, and the reclaiming note is alluded to. The interlocutor " Finds of new in the conjoined " actions, that the defenders are bound to pay to the pursuer " personally and individually, the interest on the sum of " L.3930, which, in terms of Mr Wood's interim report, is the " ascertained value of the rock or stone already reported on by " him ;" and that was most clearly and distinctly brought under the review of the Court by the reclaiming note ; and though I still think it would have been more regular and safe for the parties to have called upon the Court to do what the Lord Ordinary ought to have done, to have assoilzied the party from the supplemental action, instead of conjoining it with the other, I am not prepared to say, that the finding in the conjoined actions being specifically brought under the review of the Court, was not sufficient to give the Court jurisdiction, and having done that, to remove all possible objection.

In whatever way I consider the proviso of the 6th of George the Fourth, I am not prepared to say that the reclaiming note was not sufficient to enable the Court to alter the interlocutor of the Lord Ordinary, and assoilzie the defenders, instead of conjoining the actions ; in which case it is clear that this House would have the power of altering that part of the interlocutor of the Lord Ordinary, of the 25th of June, 1840, as well as the other important part regarding the interest ; but it is not necessary to go into that, because, if your Lordships should be of opinion that you ought, as I should recommend you, to reverse the interlocutors generally, that would reverse the interlocutor finding the appellants liable to interest, and operate as a general reversal of the judgment of the Court below.

I therefore humbly move your Lordships, that the five interlocutors appealed from be reversed.

Lord Cottenham. — My Lords, It appears to me that the principle upon which the defenders have been found liable to interest cannot be supported. It has been assumed that they are to be dealt with as purchasers of some interest in the land, and therefore they are to pay interest upon the purchase-money from the time they were in possession. Now, it appears to me that that proposition fails in all its parts. It does not appear to me that it is a contract for sale at all, and if it was, there is nothing like possession from the date from which, by the interlocutor, interest is made to run; but it is merely a contract by which the parties agree to pay a certain sum of money for the right of making a canal over the land, which is to be paid at a certain ascertained time, or a time capable of being ascertained by a future event; the contract being to pay a sum of money so soon as the adjoining workings proved that the canal really did cover such rock. Now, it is quite clear, from the proceedings of the parties and the nature of the case, that the period at which that could best be ascertained, was when the workings on the south side of the canal ascertained that the rock on the north side passed under the canal. That was the fact upon which it rested, and that did not take place till 1836; and the only question would be, whether the interest did not become payable upon that fact being ascertained, or whether the party liable to pay interest in consequence of that being ascertained, was to be excused from the payment of interest till the amount was ascertained. If the pursuer had adopted a different course, and had proceeded upon the ground of its being in the nature of a contract between the parties, it might be a question requiring farther consideration. But that is not the course taken by the pursuer. In 1833, long before he was entitled to demand any interest, he instituted this suit, and made a much larger demand than he was able to establish; and

I cannot help thinking, after that suit was instituted, the defenders were put under the jurisdiction of the Court, and they might be said to be in default for not doing that which they ought to have done; if a charge of interest had been made, they might possibly have been liable to it, if the demand had been made in the regular course. After the suit was instituted, and pending the suit, the Court, moved by the pursuer, adopted certain proceedings to ascertain the amount of the rock covered, and the amount of the money to be paid to the pursuer. It does not appear that any resistance was made by the defenders, but as soon as it was ascertained, the order of the Court was complied with for the payment of the money into Court. On the merits, therefore, I should have found no difficulty in coming to the conclusion, that during no portion of the period that elapsed from 1836 till the money was paid into Court, did any liability attach for the payment of interest.

But when the course of the pleadings is considered, another difficulty is raised, which seems to me equally fatal to his claim. He makes a large demand in 1833, without any claim for interest. In the course of the proceedings, it being suggested to him in the grounds upon which the interlocutor was rested, that this might be converted into, or that the Court might view it as, a contract of sale, the supplemental summons is filed, and in that he claims, what he could not claim nor obtain by any alteration in the original summons, as he had not demanded it. That supplemental summons, so instituted, appears to me to be clearly irregular. The Lord Ordinary conjoined the two proceedings on the part of the pur[illegible], and upon looking at the terms in which the reclaiming note is framed, it appears to me it w[illegible] calculated to bring before the Inner Court all that was done by the Lord Ordinary, and all the matters which were in debate b[illegible]e him. It reclaims against the interlocutors, and contends, that they ought to find that no interest was payable;

and one of the objections to the payment of interest was, that it had not been claimed by the original summons. That brought the question before the Court, whether the party was liable, and upon that it would be competent to the party to claim an exemption from interest upon the merits, as well as upon the formal objection of no demand having been made.

Being of that opinion, it is unnecessary for me to consider whether the proviso in the act of Parliament does not authorize the party to come here, upon the interlocutor of the Lord Ordinary, not brought by the reclaiming note before the Inner House, where there has been a final adjudication, which makes it necessary to consider the merits of the intermediate interlocutor.

It is also unnecessary to say any thing more upon the case of Jeffery *v.* Brown, which has been cited, because on the examination of that case, it appears to me it does not raise that question; it proceeded upon the proviso of the act which declares that there shall not be an appeal to this House upon an interlocutor not made the subject of reclaiming note. In that case, it appears that the party was the representative of a Mr Watson, and the objection was, that the appeal was incompetent in so far as regarded the representative of Mr Watson, as the interlocutor complained of was against Mr Watson in his character of trustee. The case states, that the interlocutor being pronounced, Mr Watson, as trustee, did not complain of that interlocutor, and by a subsequent order he was discharged from being such trustee, and exonerated. He acquiesced in the interlocutor, and was no party to the subsequent proceedings, but his representative afterwards came, and reclaimed against it; that interlocutor was a final interlocutor, and was not the ground-work of any subsequent interlocutor, and therefore it has no application to what occurs in this case, namely, the supposition that the reclaiming note does not embrace that part of the interlocutor under discussion, and it has no bearing upon that part of the case.

Upon these grounds it appears to me, both upon the merits, on the conduct of the parties, and the form of proceeding adopted by the pursuer, that he has failed to make out any claim to the interest upon the money in question.

Lord Campbell. — My Lords, If this case had depended upon the question, whether we could take cognizance of, and reverse the interlocutor, or part of the interlocutor, of the Lord Ordinary, not brought before the Inner House, I should have wished for time to consider whether the words of the act of Parliament are strong enough to give the Court jurisdiction; and as some considerable inconvenience might arise from a contrary construction, I should have wished to have seen what was done by the Court under such circumstances in cases which already had arisen. But, my Lords, without at all considering that question, we may, I think, without any difficulty, reverse these interlocutors as far as interest is concerned.

Now, this is clearly an action of contract, and the burden is upon the respondent, to shew that by his contract he is entitled to interest under the circumstances which have occurred. The contract contains no express stipulation for interest, he must therefore shew that there is an implied obligation on the part of the appellant to pay interest, under the circumstances which have taken place.

It seems to me that it is a fallacy to suppose that this is a contract of purchase and sale. I think there is no analogy between this case, and a case where a real estate is sold, and the purchaser is in possession, and liable to pay interest from that time. This is a contract by which the respondent was to be indemnified for an agreement into which he had entered, to allow the canal to be carried over his land, and that he would not work the minerals under the canal. He was to be placed in the same situation as if his lessees had worked the stone; if they had worked it, he was to receive a lordship, and the lordship that

would have been paid by the lessees was to be paid by the company, and according to the contract it was to be paid at a particular time. It was to pay a lordship upon whatever stone the canal should cover, so soon as the adjoining workings proved that it did really cover the rock. It was therefore a contract to pay a sum of money at the particular time here mentioned. Now, if before any action had been brought, it had been ascertained that the stone did come to the south side of the canal, and it had been ascertained what the quantity of stone was, so that the principal sum of money could have been ascertained, I think interest would have clearly run from the time the amount was so ascertained, if not from the time when it was clearly established that the rock did run at the other side of the canal. But when this action was brought in 1833, it had not been ascertained that the rock did come to the south side of the canal, the time had not arrived when the principal sum was to be paid. Therefore, at the time the action was brought, no interest could have been given, and there was no ground for including in the summons the demand for interest.

Then, during the progress of the cause, it turned out upon a reference to Mr Wood, that upon a given day there was a certain sum which was due, but this was long after the action had been commenced, and there was no default at all upon the part of the Company. There was at first a prospect of ascertaining what the amount was, but when the amount had been ascertained, there was no application to pay the money into Court till 1839, and then it was paid into Court. I am therefore of opinion that no interest is recoverable.

But, my Lords, I am also clearly of opinion, that, as is admitted, according to the form of proceeding in Scotland, interest could not be awarded by the Court. Unless there was an allegation or prayer in the summons for interest, upon the ground that interest had become due, it could not be recovered. Now, here

the plaintiff thought right, instead of an amendment, to file a supplemental summons. This, I agree, is a clear evasion of the statute. If interest was due, that interest was only accessary upon the non-payment of the principal, and if there had been judgment for the respondent regarding the principal without any demand of interest, he could not have brought a separate action claiming interest, he having omitted to claim interest in the action brought for the principal. If that be so, how could he bring a supplemental summons, which is only tantamount to an amendment of a defective summons. The act has expressly said there shall not be any such amendment under circumstances such as these, and the supplemental summons is only an amendment.

I was a little startled by the mention that the irregularity had been cured by the form of the reclaiming note; but when I look at the reclaiming note, which is now before me, I think it embraces the whole of the interlocutor. I am of opinion, that the Inner House might have assoilzied the defender from the supplemental summons with expenses. I am of opinion that that is the judgment which the Inner House ought to have pronounced, and I am of opinion that the judgment which this House ought to pronounce is, that this supplemental summons ought not to have been conjoined with the original summons, but dismissed with costs.

I therefore concur in the opinion of my noble and learned friends, that these interlocutors should be reversed in the manner described, and that the supplemental summons ought to be dismissed; and that the defenders ought to be assoilzied with costs.

Lord Brougham. — It is quite understood we give no opinion upon that part of the interlocutors relating to the principal sum; we allow all excepting the interest.

It is Ordered and Adjudged, That the said interlocutors complained

of in the said appeal, in so far as the same find the appellants liable in payment of interest upon the ascertained value of the stone under the canal, be, and the same are, hereby reversed: And it is farther Ordered and Adjudged, that the case be remitted back to the Court of Session in Scotland, with directions to assoilzie the defenders from the conclusions of the supplementary summons, and to find them entitled to the expenses of the proceedings consequent thereupon, in the said Court, and to make such other orders regarding the sum consigned in the hands of the Bank of the British Linen Company, and interest accrued thereon, and to do otherwise in the cause as shall be just, and consistent with this judgment.

RICHARDSON & CONNELL — G. & T. W. WEBSTER, Agents.