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

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

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

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

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

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

Judgment of reversal, with declaration.

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

JUNE 30, 1870.

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

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

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

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

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

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

not in the nature of an island, the *medium filum* was to be drawn without regard to such sand bank, and as it was within the pursuer's half of the river the pursuer had the exclusive right of fishing upon it. Both parties having presented reclaiming notes, the First Division affirmed the interlocutor with a qualification touching a subordinate finding. The pursuer now appealed against the interlocutor.

The *Lord Advocate* (Young), and *Sir R. Palmer* Q.C., for the appellant.—The interlocutor was wrong as to certain points, so far as adverse to the appellant. The appellant, under his titles, had the right of fishing *ex adverso* of his estate *ad medium filum aquae* either expressly or as having had possession for forty years and upwards under his titles—*Lord Advocate* v. *Sinclair*, 3 Macph. 997. The respondents had no Crown grant of salmon fishings, and at the most have only a base title from a subject superior, which was not followed by possession; or if such possession was had, it did not extend to the *medium filum*. The estates of property and superiority of the respondents' lands having been consolidated in 1784 in Mr. Hunter, the necessary effect was to extinguish the property title—Ross, Lect. 222, 240; Ersk. iii. 8, 81; Stair, ii. 11, 1; *Lord Advocate* v. *Sinclair*, L. R., 1 Sc. Ap. 178; *ante*, p. 1493. But irrespective of that, the bank, being in the appellant's half of the river, ought not to be treated as part of the *alveus*, but as the shore side from which the *medium filum* is to be measured northwards and parallel to such bank. As the sand bank causes a *cul de sac* in the river on the appellant's side, the sand bank should be the line of southern shore, as between the parties—*Wedderburn* v. *Paterson*, 2 Macph. 902. The existence of the bank prevents the appellant exercising his right of fishing in the mid-channel, and the interlocutor ought to be reversed, in so far as it treats the bank as part of the appellant's half of the *alveus* of the river.

Mellish Q.C., and *C. G. Wotherspoon*, for the respondents, were not called upon.

LORD CHANCELLOR HATHERLEY.—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 declarations, and also asking for an interdict in respect of what had been done by the defenders, the Lord Ordinary, on the 8th of January 1867, pronounced this interlocutor. He found, first, as a matter of fact, "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 Balinbreich 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." Then 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 the 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,) "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 defender's 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 rights, 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 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, 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, barony of Ballinbreich or Balinbreich belonging to him and known as the estate of Balinbreich, 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 Balinbreich Bank or Eppie's Taes bank, lying opposite the pursuer's said estate, in so far as the same is situated to the south 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 held 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 Eppie's Taes bank, is so formed that in reality it should be treated as a part of the southern bank of the river, and so attached to the southern bank of 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 the *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 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 joined solidly 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, viz. 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 disponed, 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. An apparent title, at all events, is evidenced by actual user anterior to the year 1784; a sasine was had and the right was feudalized 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 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 rights): The right of fishing having become vested in Hunter, he afterwards acquired also 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 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 laws 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 to 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 superior to the fishery is disputed, and it does not in fact appear 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 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 superiority, and when you come to examine the titles to the superiority, 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, and 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 the 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 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, the right which was effectually vested in the vassal, and which, if the superior 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 superior 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 a something to which he had a right to 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 superior, because the superior had no interest in the matter resigned, but the effect was simply to destroy that which it was his intention to confirm. I am happy to find, that it seems to be conformable to Scottish law, that consolidation had not that 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 the 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.

For these reasons I have stated, it appears to me, that the restriction did not affect the rights conveyed to Mr. Hunter, and subsequently to the respondents in the present appeal, and that, therefore, the finding of the Lord Ordinary, which was confirmed 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 having become attached to the southern bank, and is 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 that 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 northern side. That water is said to be some ten or eleven inches only in depth, and there may be extreme cases of low tide in which persons may pass 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, as long as that state of things continues—one cannot tell of course what changes, 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 a channel which is used for navigation in some states of tide, which is used and 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 original southern bank, passing over 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, 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 such 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 claims 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 have 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 rivers, 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 have been sufficient to put the respondents' titles in issue, as by the Scotch Judicature Act 6 Geo. IV. c. 120, § 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 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 Balinbreich, 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 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."

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 sand bank having been formed 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 limit 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 the 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 no longer had any continued existence. And some book was referred to, or work of some learning, Mr. Ross's Lectures, in which, probably not thoroughly understanding the English doctrines 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, as is evidenced by the very language of the instrument, for the instrument of resignation *ad remanentiam* is set out by the appellants; 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 his 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 proceeds on a narrative of a disposition dated the 16th of May 1683, "made and granted by Alexander Duncombie of Lundie, whereby he sold, annailzied, and disponed" to him the subject of the grant which was then the subject 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 shewn 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 Balinbreich, and they also claim a right to salmon fishing in the river *ex adverso* of the lands of Balinbreich 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, 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 to 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 the 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 northern side 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 river 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 at 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 supported 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 ground 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, 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 that 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) "has lost the right to them altogether, because it was said there could be no effectual consolidation, seeing that, *ex facie* of

his title, 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 could well 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 feudalizing. 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 it 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 that 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 *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 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. I think the judgment of the Court below ought to be affirmed.

Interlcutors affirmed, and appeal dismissed with costs.

Appellant's Agents, H. G. and S. Dickson, W.S.; Loch and Maclaurin, Westminster.—*Respondents' Agents*, T. and R. B. Ranken, W.S.; Stibbard and Beck, London.

JULY 11, 1870.

THE COMMISSIONERS OF SUPPLY FOR THE COUNTY OF LANARK, *Appellants*, *v.* NORTH BRITISH RAILWAY CO., *Respondents*.

Railway—Assessment—Exemption—Valuation Act—Prisons Act—General Statute repealing Special Statutes—*Two special railway Acts, passed in* 1825, *exempted the lands taken for the purposes of the railway from all public and parochial burdens.*

HELD (reversing judgment), *That such exemption was impliedly repealed by the Valuation Acts and Police and Prisons Acts, which imposed burdens altogether new since the passing of the special railway Acts.*

This was an appeal from a decision of the First Division. In 1867 the North British Railway Company raised an action of declarator against the Commissioners of Supply for the county of Lanark, seeking to have it declared, that the company was exempt from certain assessments made by the defenders upon the company. The Act for making the Monkland and Kirkintilloch Railway passed in 1825, and expressly provided, that the lands conveyed to the company shall not be liable for land tax, nor any public or parish burden. The Act for making the Slamannan Railway, passed in 1835, also provided, that the grounds should not be liable in payment of cess, stipend, schoolmaster's salary, or other public or parochial burdens, but the same shall be paid by the original proprietors of such grounds. These railways now belonged to the North British

[1] See previous report 7 Macph. 201; 41 Sc. Jur. 130. S. C. 8 Macph. H. L. 141; 42 Sc. Jur. 506.