cannot see how any such duty could be said to lie on the defenders.

This is not in my view a claim arising out of a wrong done to the pursuer for which all concerned in the wrongdoing would be liable. The defenders committed no delict or *quasi*-delict. The most that is alleged against them is a breach of contract. For that, if true, they must answer to the person with whom the proper contract was made, but to no other. What the pursuer may have reason to complain of is, that Seath & Company having accepted from the defenders an insufficient gangway the pursuer's employers were negligent in failing to see that the gangway was made sufficient before permitting or inviting their servants to use it. But this just comes to a claim against the pursuer's employers for failure to perform a duty incumbent on them, not a claim as for a wrong done to the pursuer by the defenders.

The LORD JUSTICE-CLERK concurred.

The Court dismissed the action as irrelevant.

Counsel for the Reclaimers—H. Johnston — Ure. Agents — Smith & Mason, S.S.C.

Counsel for the Respondents—Strachan —Watt. Agents — Clark & Macdonald, S.S.C.

Friday, December 11.

SECOND DIVISION.

[Sheriff of Ross, &c.

ROSS *v.* POWRIE AND PITCAITHLEY.

Property—River, Tidal and Navigable—Obstruction in alveo—Salmon-Fishings—Interdict.

A tidal and navigable river ran in a curve from north to east. The main run of the water was towards the right bank, which practically held in the water, while certain low flats and channels were left along the left bank at ebb tide. The chief pressure of the water was upon the right bank, at the lowest part of the curve, and at this point the water had a tendency to flow in small streams across the base of a peninsula which formed part of the right bank of the river, and along the face of which there was a valuable salmon shot. The tenants of the salmon-fishings on the left bank erected opposite this point an embankment of piles, boards, and shingle, for the purposes of their fishing, and the proprietor of the fishings on the right bank sought to interdict it as *in alveo*, or at anyrate as injuring or threatening injury to his property.

It was proved that the erection interfered with the flow of the water, which naturally ran, not eastwards past the face, but northwards over the site of the erection; that it was constructed partly on one of the said flats and partly in the *alveus* of the stream covered at low water at summer flow, and that at least the substantial part thereof was erected in the *alveus;* that it had the effect of forming at that place a bank of sand and gravel; and that the additional pressure of the water caused by it had materially increased the volume of the streams which ran across the base of the peninsula on the opposite bank, which, if further developed, would transform the peninsula into an island, and thus injure the fishings along the right bank of the river formed by this peninsula.

Held that the embankment was illegal, because (1) it was *in alveo*, (2) even if not altogether *in alveo*, it was *unum quid*, and (3) even although it was not *in alveo*, but on the foreshore, it affected the ordinary flow of the water to the prejudice of the complainer.

This was an action in the Sheriff Court of Ross and Cromarty, by which Sir Charles Ross of Balnagown, with the consent of the tacksman of the salmon-fishings in the Kyle of Sutherland at Bonar, craved interdict against Powrie and Pitcaithley, salmon fishers, Perth, tenants of salmon-fishings on the opposite side of the river belonging to George Auldjo Jamieson, C.A., Edinburgh, trustee on the sequestrated estate of Evan Charles Sutherland of Skibo. The petition prayed that the respondents should be interdicted from (1) encroaching upon the *alveus* of the Kyle of Sutherland by driving stakes into the *alveus*, and erecting an embankment of shingle along the line of these stakes in the *alveus* at a place *ex adverso* of the complainer's lands, which had the result of elevating the *alveus*, and obstructing, narrowing, or deviating the stream of the Kyle at that part; (2) from using that embankment for fishing purposes in the Kyle, and to have the *alveus* restored to its former condition.

The Kyle of Sutherland is a tidal and navigable river, and divides the lands of Balnagown and Skibo, which lie respectively on its right and left banks. In this part of its course it runs in a bend from north to east. The main run of the current is towards the right bank, which practically presents a continuous and definite line of resistance except at one point as aftermentioned. On the left bank the water is shallower, and at low tide various shoals and mud-flats, intersected by channels, are exposed, particularly opposite the southmost or lowest part of the said bend or curve. From this point the right bank stretches to the sea in a long and narrow peninsula, and ends in the "Scaup Point," which affords a valuable salmon shot. At the lowest part of the said curve the pressure of the water is greatest, and the water has a tendency to make its way in small streams over the base of the peninsula. It was exactly opposite this point that the

respondents erected their embankment, partly on one of the aforesaid mud-flats and partly in the *alveus* of the river.

The complainer averred—"(Cond. 6) The said illegal works are about 2½ feet in height, and form an obstruction in the *alveus* of the Kyle. They have shut up the stream in parts which were open beyond the memory of man, narrowed the main channel, and diverted the flow and weight of the stream so as to bear unequally upon the south side, and are certain to cause great damage to pursuer's said fishing banks, both above and below the spot in question. (Cond. 7) The said erections will alter the configuration of the Kyle and narrow the main channel, and deflect the current towards Kincardine Bay. They will prevent the salmon passing up the river with as great freedom as heretofore, and will be an obstruction or impedient to the passage of salmon under various Acts of Parliament and at common law. For a period of nearly a century no obstructions of the kind complained of were erected on the spot in question, and there never has been a towing-path at the spot in question used in connection with the Skibo fishings. The pursuer interdicted the previous Skibo fishing tenant from embanking there, conform to the extract-decree produced, and when the defenders entered on the present tack there was no towing-path there." It was not denied that the respondents had the right of fishing over the spot on which the embankment was erected.

The complainer pleaded—"(3) The defenders in making the encroachments and raising such obstructions have acted illegally, and are bound to restore the river to its former course, and to restore the *alveus* to its natural condition, and failing their doing so the Court should grant warrant for the purpose as craved. (4) The erections complained of being of the character of obstruction prohibited by statute, and being within a river or its estuary, are illegal, and may not be completed, and that part already completed ought to be removed. (5) The pursuer is entitled to prevent any erection being made in the *alveus* or foreshore *ex adverso* of his property calculated to affect the natural flow of the water."

The respondents pleaded—"(1) The averments of the pursuer, so far as material, being unfounded in fact, the interim interdict ought to be recalled, and the prayer of the petition otherwise refused. (2) The structure or erection complained of being in itself a legal erection, and being no obstruction or impediment to the passage of salmon or navigation, the interim interdict ought to be recalled, and the defenders assoilzied with expenses."

Upon 16th June 1891 the Sheriff-Substitute (MACKENZIE) pronounced this interlocutor:—Finds that the defenders, who are tenants of salmon-fishings belonging to the Skibo estate, on the north side of the Kyle of Sutherland, erected in May last year a breakwater or embankment 155 feet in length, and from 18 inches to 2 feet in height, as shown in the plan, and that in doing so they acted without the knowledge or authority of their landlord, the proprietor of said fishings: Finds that said erection is on ground below low water-mark, is an encroachment on the bed or *alveus* of the river (which is a tidal one, with varying currents and levels), and is situated *ex adverso* of the property of the pursuer on the south bank of the river: Finds that the effect of said erection has been to heighten the north bank, and thus to prevent and obstruct a considerable natural flow of water over the same to the north, and to throw the weight of the water on to the south bank, with the result that a new channel of the river is being formed, or is in imminent danger of being formed, through the said south bank: Finds that the pursuer's rights of property there have thus been or are in course of being injuriously affected, and that he is in consequence entitled to have the defenders interdicted from proceeding further with or completing the said embankment, and to have the same removed: Therefore continues the interdict already granted, and declares the same to be perpetual: Finds further, that the said embankment, so far as begun and completed, is illegal and injurious to the rights of the pursuer as proprietor foresaid, and must be removed: Therefore ordains the defenders within ten days from this date to remove the same, &c.

"*Note.*—Notwithstanding the voluminous proof and the variety of questions treated therein, the Sheriff-Substitute is inclined to regard the decision of this case as dependent on a very simple issue.

"The erection in question was admittedly put up by the defenders with the sole object of improving their net fishing at a place where previous to 1885 there was no fishing 'shot' or proper 'hauling' place. It was so put up by them, however, in the knowledge that when a similar work was attempted by their predecessors in the fishings in 1888 an interdict was granted. Further, it was placed in a part of the channel where its object admittedly was to interfere with the natural run of the water across the Skibo side. . . .

"The Sheriff-Substitute in deciding this case against the defenders has done so on evidence (mainly supplied by the defenders themselves) which satisfies him that the erection complained of is an interference with the unrestricted flow of the water, and he has applied to them, as tenants, the legal principle which would rule in a similar case between proprietors, viz., 'that two riparian proprietors have a common interest in the stream which entitles each of them to prevent anything being done whereby the regular and natural flow or course of the water may be altered or affected.'

"The defenders here cannot be in a better position as regards the law than their landlord, the proprietor of the fishings, who has not adopted or sanctioned their proceedings, and as he could be restrained from interference with the natural flow of the stream, so must they."

The result of the proof is exhaustively

stated in the opinion of the Lord Justice-Clerk.

The defenders appealed, and argued—The banks of this river were in reality a kind of mudflat which were only bare when the tide was not flowing. The whole proof showed that these banks were very apt to be cut up by streams. The operations which were complained of in this case were all situated above high water-mark as shown by the proof except a very small part. The work was therefore executed upon the foreshore; the right to do so was not challenged by the Crown; it was therefore on the defenders' own ground, and the pursuer would have to show that he had really been injured by the defenders' operations. After the recent cases it could not be held that all works in the *alveus* of the river were unlawful. The present case did not fall under the rule of *Morris* v. *Bicket*, May 20, 1864, 2 Macph. 1082—*aff.* July 13, 1866, 4 Macph. (H. of L.) 44. It was more like the case of *Colquhoun's Trustees* v. *Orr Ewing & Company*, January 26, 1877, 4 R. 542, *rev.* July 30, 1877, 4 R. (H. of L.) 116—according to that case as finally decided, a proprietor could only build what might be called an obstruction upon his own property if his neighbour did not object; but if the invasion was only of a right and not of property, an objector must show actual injury before he could get it removed; this was a much larger bay and a much smaller obstruction than in that case. Although the pursuer had a common interest in the *alveus*, he had no property in the part where the appellants had erected the obstruction complained of. The other cases for the appellants were *Jackson, &c.* v. *Marshall*, July 4, 1872, 10 Macph. 913; *Duke of Roxburghe* v. *Waldie's Trustees*, February 18, 1879, 6 R. 663; *M'Gavin* v. *M'Intyre Brothers*, May 30, 1890, 17 R. 818; *Mather & Company* v. *Macbraire*, March 14, 1873, 11 Macph. 522; *Duke of Sutherland* v. *Ross*, May 26, 1877, 4 R. 765—*aff.* April 15, 1878, 5 R. (H. of L.) 137. This erection was really used by the appellants for the purpose of carrying on their fishing operations. That had been held to be a proper use of this river in the last-cited case.

The respondent argued—On the proof it appeared that there was an embankment of stones and gravel raised upon the *alveus* of the river. It was not raised upon the foreshore because it was plain that it was only the stakes that were left uncovered at low tide, but the embankment into which the stakes were placed was never uncovered by the water. It was admitted by the appellants that this embankment was not necessary for the protection of their bank, as it was said to be only used for the purposes of fishing. It further appeared that if this embankment was not in the place it occupied, the water would flow over the place it stood instead of being pressed over to the respondents' bank and causing it to break down as the proof showed it did. Now, it had been observed in the case of *Morris* v. *Bicket*, cited *supra*, that it was impossible to know what would be the result of any deflection of a body of water. It was also decided in that case that common property was not necessary to enable a neighbour to object to an obstruction being put in the *alveus* of a river; common interest was all that was needed, and common interest existed here. It was of importance to the pursuer that this obstruction should not be placed in the river, because its very presence necessarily caused a pressure of the river on his bank, that caused the river to take a new course and if so, then the pursuer would lose one of his most valuable fishing stations. It was not necessary to show a common interest in the *alveus* if the objecting party could show a common right in the stream—*Duke of Roxburghe* v. *Waldie's Trustees*, cited *supra*; *Robertson* v. *Foot & Company*, July 16, 1879, 6 R. 1290. It was for the appellants to show that they had not put an obstruction into the river, but this they had not done, because the proof showed that the obstruction was really in the *alveus*—*Forbes* v. *Smith*, June 28, 1823, 1 W. & S. 583.

At advising—

LORD JUSTICE-CLERK—The complainer in this case is the proprietor of the salmon fisheries on the south bank of the Kyle in Ross-shire. This river is a tidal river at the point in question. The complaint is against the tenants of the salmon fishery on the opposite side of the river, and is raised for the purpose of interdicting them from placing obstructions in the *alveus*, and having them ordained to remove an obstruction they have already placed there, which it is alleged has or will have the effect of throwing more pressure of water against the complainers' bank, and so injuring their fishery. On the complainer's side the bank as it at present subsists practically holds in the water in the channel at all times of the tide with certain small exceptions to which I shall afterwards allude. On the respondents' side the case is different. As the tide falls a number of low shore-flats, divided by channels more or less at an angle to the general direction of the stream, are exposed on that side. The stream then practically flows between parallel banks, its width at and near the place in question being, roughly speaking, about 150 feet wide, and only a small quantity of water flowing by the channels between the shore-flats on the north. In this channel the stream flows, at that part of the channel where the bulk of the water is, with very great rapidity, the evidence putting it at more than nine miles an hour. This stream flows in a curve from right to left, and therefore its pressure is against the south bank. There is a tendency opposite the point at which the respondents' operations complained of were executed, for the water to make its way through the bank southwards in small streams tending to cut off a peninsula which is formed by the river and the Firth of Dornoch beyond, and to convert the peninsula into an island, thereby, of course, diminishing the flow of water round the north side of the peninsula.

These were the circumstances of the case before the operations of the respondents which are now complained of. The operations consisted in driving a series of piles into the ground for about 150 feet and placing a platform on them to aid the fishermen in working their nets at certain states of the tide. At the bottom of the piles they are banked up to a certain height with shingle. At first, boards were fastened along the piles, but these were afterwards removed. The line of the piles is practically parallel to the opposite or complainer's bank. The piles are partly driven into one of the shore-flats, and partly into the *alveus* covered with water at low water, and when the river is in summer flow. The whole erection is covered when the tide rises, and a substantial part of it is under water at low tide, when the river is sending down more water than it does in the driest part of the year.

The complainers' case is that this erection is absolutely illegal in so far as it is in the *alveus*, and that it is open to challenge, because it has the effect or may have the effect of compressing the stream by preventing the free spread of the water to the northward, and thus does or may cause erosion on the south bank, with the effect that the water will break out more and more across the neck of the peninsula, thus depriving the complainers of the flow of the river past the peninsula as they now enjoy it, and so injuring their fishery at the mouth of the estuary.

The respondents, on the other hand, maintain that the erection is not truly to any extent *in alveo*, that in any case it is plainly *innocuæ utilitatis*, and that the complainers have no ground for objecting to its being left where it is.

I have considered the case with anxious care, the interests involved being so serious, and the possible results of any judgment to be pronounced upon fisheries in similar estuaries being so important. I have come to the conclusion that the Court ought not to interfere with the judgment given by the Sheriff-Substitute. It appears to me that the evidence adduced for the complainers proves satisfactorily that the erection made by the respondents does interfere with the natural flow of the water. This is shown by the fact that the water flows through the respondents' banked-up shingle and piles in a northerly direction when the tide is out and no flood in the river. That is therefore plainly a natural direction for the water to take even at the ebb of the tide—I mean the water which comes down the river proper as distinguished from tidal water. This point seems to me so important that I think it necessary to refer to the evidence. Mr Stevenson, the engineer, states that he examined the defenders' erection at "low tide," and "when there was no 'fresh' in the water." At that time he says that "there was water flowing through the shingle-bed at the west end of the piling," and that 60 feet of it was in the water, and therefore in the *alveus* of the stream. He also says that such an erection "would have a tendency to collect gravel at and around it." He also expresses his opinion that at the part of the erection where the piles are not in water at low tide, the *alveus* has been artificially raised. This means that part at least of the embankment put up round the piles by the defenders, is placed in the *alveus* of the stream. Mr Black also examined the erection at low water. Mr Black says that he examined the place at low water, and that "there was water flowing between the piling at the east end, and was percolating through the shingle along the whole land to an extent which convinced me that if said obstruction or embankment were removed there would be a clear flow of water northward over the side of the present embankment and obstruction." He also says that it tends to accumulate deposits. He estimates that the shingle at the piles is 10 inches to a foot "above the natural shingle of the bed of the river," and that he is convinced that the ground into which "the piling was driven was on a level with low water-mark." James Bethune, the pilot, states that there is now "shingle along the line of the piles where formerly no shingle used to be. Before these piles and shingle were put there the water had a free run northwards." The pilot Munro says that at low water "there was about five inches of water along the front of the piles," and that "once the bank gets dry the river water runs against the piles, and if they were not there it would run towards the Skibo," that is, "the north side." William Bethune proves that when a net is shot above the place in question "it swings round to the left bank near where the middle of the present obstruction now is." He also says that "at low water the whole of the piling of the defenders' obstruction appeared above water. At this time I could not see the base in which the piles were fixed as it was below water. The piles were driven into the ground and banked up with stones. The bank where the piling now is was never dry during the time I fished for Mr Marshall." That was in 1887. Peter Scott says that the piles are driven below low water-mark, and that "he saw the water run about the posts and over the ground," and that "when nets are drawn there they are drawn in the water, and not on dry land. Before the piling was put up the water ran over the place towards the Skibo side, and it still does so at the bottom end of the piling where the boarding has been taken of." It is right to say that in cross this witness, in answer to a question, says that six or seven of the piles were driven into ground which was "not dry at low water." Mr Manners, the engineer, says that along the piles "there is a bank of shingle, evidently artificial. At the lower end of this obstruction I noticed that the water flows over the top of this artificial shingle bank, and that for the remainder of its length the water percolates through the bank towards the Skibo side." He adds, "the artificial bank about the base of the piles obstruct the natural flow of the water to the Skibo

side." The river has a natural tendency to flow over these banks to the Skibo side. And in cross-examination he said—"From my examination of the piling I concluded that if the artificial embankment were away the piling would all have been into ground below low water-mark."

The evidence for the defence upon this matter is of course not so strong, and indeed in some respects contradictory of the complainer's evidence. It tends to prove that at the upper end of the defenders' erection there is dry ground when the river is low, between it and the water. But it appears to me that when the evidence is sifted the true result is that the defenders' banking up of the piles with shingle is truly the cause of there being uncovered ground to the south of the piles at low water. Thus John Powrie admits that "water from the main stream trickles through the embankment on to the Skibo side." George Main admits that "if the embankment were removed from the ground on which it is built a very little of that ground would be above the low-water level." Then Mr Westland, the engineer, proves that the bottom of the respondents' erection is 2 feet lower than the opposite bank. He also found that at low water only one-half of the respondents' erection was uncovered. Mr Gordon, the engineer, found the water at low tide about a foot up the piles at the lower end. And this witness expresses his belief that a quantity of shingle has not been deposited on the ground at the place, while there was no doubt that there was. This witness also admits that if the banks on the Skibo side are raised by artificial means "the stream would not get relief, and if such relief were stopped, the tendency of the stream would be to break over the Balnagown bank." Mr Young, the engineer, when the water was very low, found six of the piles, where they show above the shingle, under water, and he says that, assuming the river gets lower in summer, the piles would be above low water-mark. It is to be noted that it was in March that Mr Westland and Mr Young were at the place. Mr Calder says that some of the piles are in the water at low tide, and that he saw water "trickling through the shingle bank," although he cannot be sure that it was low tide.

Now, that body of evidence convinces me that the whole or a very substantial part of the respondents' erection is in the *alveus* of the stream. It is true that some of the witnesses for the respondents say that the defenders' erection is altogether above low water-mark, but their evidence cannot in my judgment overcome the great body of evidence to which I have referred. It is remarkable that the workmen who actually drove the piles and banked them up with shingle are not called as witnesses. It is not conceivable that if they, when they drove the piles, drove them into ground above the water at ebb tide, they should not have been put in the box to prove this fact. They must have known best, as they dealt with the ground as it was before any piles or shingle were placed there.

I have therefore come to the conclusion that it is proved that the respondents' erection is to a substantial extent—indeed in my opinion practically to its whole extent—an encroachment on the *alveus* of the river. It seems to be clear that if that is so, then the embankment and piles must be to a greater or less degree an obstruction to the natural course of the water at that point. But if the water is obstructed, then the tendency must be to some extent at least to compress the flow of the water in the channel between the respondents' erection and the complainers' bank. In so far as there is increased difficulty presented to the water in going in the direction in which it naturally inclines at the place where the respondents have made their erection, in that degree must the water exercise more force elsewhere.

Now, the complainers say that the practical effect is that the quantity of water which finds its way out to the southwards opposite the respondents' erection is greater than the quantity which passed out there in the period before it was placed there. They produce a considerable body of evidence to prove this, and there is no counter evidence. They prove that while formerly the streams breaking out there were not more than an inch or two in depth, they are now as much as 11 inches in depth. This can only be the result either of the erosion of the bank by an increased pressure or by the level of the water being forced up by the diminution of the freedom of escape for the water in a northerly direction at the opposite side.

Such being my view of the facts of the case, it only remains to consider what is the law applicable to them. I take it to be settled law that no proprietor is entitled to place any obstruction upon the *alveus* of a stream, even although the stream be not tidal and he has the right of property in the *solum* up to the *medium filum*. The case of a tidal stream is *a fortiori* of an ordinary stream. The rights of the riparian proprietor are more limited, as he cannot have a right of property in the *solum*. He may obtain right to foreshore by grant from the Crown, but he cannot obtain a grant beyond low water-mark. The *solum* of the *alveus* is in the Crown as one of the *regalia majora* for public uses, and cannot be alienated. The law as regards the *alveus* of a river was very fully gone into in the case of *Bickett* v. *Morris*, and fully justifies, in my judgment, the statement that a riparian proprietor cannot by himself and his tenants maintain a right to alter the *alveus* of a river. Of course there are many unimportant things done by proprietors or tenants which are technically an interference with the *alveus*, such as driving in a stake or two to project the end of a fence to prevent stock passing out of a field, or the like. These no one objects to, and would probably not be held ground for interdict if challenged, on the principle "*de minimis non curat prætor*." But wherever there is any definite alteration of the condition of matters as regards the *alveus*, the law is that an opposite pro-

prietor may insist on stopping what is being done, and having matters restored. The only exception which has been made to this is the case of those having right to salmon fisheries, who are held entitled to maintain their fishery in the condition in which it has been occupied. For example, if heavy boulders are swept down in flood on to a salmon shot, these may be removed, on the ground that they interfere with the nets and prevent the beneficial use of a right of franchise in salmon-fishing. That was decided in the case of *Macbraire*. It was held to be no interference with the rights of an opposite proprietor; it was truly an interference with the *alveus* which could not injure the complainer, being only a maintenance of *status quo*, and only done to prevent destruction of a valuable right granted. But that case went only to a right of preservation and restoration; it had no bearing upon the question whether an *opus manufactum*—a new erection—may be placed in the stream.

The law appears to me to be distinctly settled on that question to this effect, that if the *alveus* is altered by the act of the opposite proprietor or those in his right, the other proprietor can, first, stop his proceedings, and second, insist upon restoration, and this without the complainer being required to prove that the operation has caused or must cause damage on his side of the river. Such was the law laid down in *Bickett* v. *Morris*, and is well expressed in Lord Benholme's judgment, which is approved of by the House of Lords as being "perfectly sound in principle," where he says—"Without my consent you are not to put up your building in the channel of the river, for that in some degree must affect the natural flow of the water. What may be the result no human being with certainty knows, but it is my right to prevent your doing it, and when you do it, you do me an injury, whether I qualify damage or not. Lord Cranworth expresses this in other words—"The owners of land on the banks are not bound to obtain or to be guided by the opinions of engineers or other scientific persons as to what is likely to be the consequence of any obstruction set up in waters in which they have a common interest. There is in this case, and in all such cases there must ever be, a conflict of evidence as to the probable result of what is done. The law does not impose upon riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testimony. They are allowed to say—'We have a common interest in the unrestricted flow of the water, and we forbid any interference with it.' This is a plain intelligible rule, easily understood and easily followed, and from which, I think, your Lordships ought not to allow any departure."

Applying these views to the present case, I think your Lordships can have no hesitation in holding that the erection in this case, if to any substantial extent *in alveo*, may be objected to by the complainer, on the footing that it may cause changes in the flow of the stream, which may cause injury to his property, and if so' that its removal must be ordered.

One question remains. This erection, it is said, is, if *in alveo* at all, not altogether *in alveo*. My own view upon the evidence is that it is substantially all *in alveo*. I am inclined to hold that where a substantial part of such an erection is certainly *in alveo*, even when a river is at its very lowest, it is not proper to deal with the matter by attempting to define the exact line of low water of a river. The line of low water of a river at the very extremest time of drought is not truly the line of low water. The true line is that at which a flow will be in the dry season of an ordinary year. But if that be the sound view, as I think it is, then I have no doubt that practically the whole of this erection has its base within low water-mark. I therefore hold that it is all liable to be removed. But even were it otherwise, it is beyond doubt that a substantial part of the erection is below the line. If this is so, then it is certain that it is only a question of inches as regards the whole erection being in the waterflow. And as it undoubtedly checks the flow of the water towards the Skibo side, it is an erection which if it tends to injure the interests of the opposite proprietor, cannot be allowed to remain. This is, I think, the logical result of the case of *Menzies* v. *Breadalbane*. A proprietor may protect his bank, but not in such a way as to cure his own injury by injuring his opposite neighbour. If, then, the respondents' erection tends to injure the complainers' property, as on the evidence I hold it does, I am of opinion that although part of the erection be slightly above the low water-mark in part of its length, yet still the whole erection is open to the complaint made against it.

I may say further that even if the law were not as I have stated as regards erection on the bank, I should still be inclined to hold that the whole erection should be ordered to be removed. It is a *unum quid*, and even upon the respondents' own showing it is to a substantial extent in the *alveus*, the rest of it being on a shore-flat close to the line, and tending, as the evidence shows, to collect sand and gravel on the ground below low water-mark immediately in front of it.

But I feel bound to say that my own opinion is, that the complainers have proved the erection to be *in alveo*, and that therefore it is in its entirety illegal. I therefore move your Lordships to find substantially in terms of the judgment of the Sheriff-Substitute.

LORD YOUNG—I think that this case is a difficult and doubtful one, but after consideration upon the whole matter I am not satisfied that any satisfactory ground has been stated to us for setting aside the Sheriff-Substitute's judgment.

LORD RUTHERFURD CLARK—I am of opinion that the complainer is entitled to prevail. I proceed entirely upon this ground, that it is sufficiently established by

the evidence that the respondents' works are injurious to the complainer.

LORD TRAYNER—The pursuer in this case complains that the defenders have recently erected an embankment on the Kyle of Sutherland and in the river which flows through it, which injures the pursuer's fishings *ex adverso* thereof, or which at the least threatens to injure those fishings very seriously. The defenders admit that they have erected the embankment complained of, but justify their action on the grounds (1) that their embankment is erected *in suo*, and (2) that it is *innocuæ utilitatis*. Looking to the fact that the embankment is a *novum opus* confessedly for the purpose of improving the defenders' fishing, and not for the purpose of fortifying their bank, it seems to me that it lies upon the defenders to show that they are entitled to do what is now complained of. On a careful consideration of the proof I am satisfied that they have failed to do so.

In the first place, I think the defenders have failed to show that the erection complained of is *in suo*. Some witnesses gave evidence to the effect that the embankment is altogether *in alveo* of the river; others describe it as to a considerable extent *in alveo* of the river, and the remainder on the *alveus* or foreshore of the Kyle; others again say that the embankment is erected on ground that is dry at low water. Whichever of these views is correct, the embankment cannot be said to be erected *in suo* of the defenders or of their landlord. The *alveus* of the river (it being tidal and navigable) is vested in the Crown, and the foreshore of the Kyle is vested in the Crown also—at least I must so presume in the absence of any averment that the proprietor of Skibo has any prorpietary right therein. Now, if the embankment is entirely within the *alveus* of the river, and injures or threatens injury to the rights of the pursuer, it is quite clear that it is illegal and must be removed. If, on the other hand, it is erected partly on the *alveus* of the river and partly on the foreshore of the Kyle, I think the same result follows. I regard the embankment as *unum quid*, and if part of it is illegal I think the entire removal must be ordered. I do not think the pursuers are required to show that every yard of the embankment is an illegal encroachment on his rights in order to obtain the remedy he here seeks. It being clear that part—a substantial part—of the embankment is undoubtedly illegal, it follows in my opinion that the embankment must be removed. Again, if the embankment is entirely on the foreshore—that is, above low water-mark—I think the pursuer is still entitled to insist on its removal, because it affects the ordinary flow of the water both on the Kyle and in the river, to his prejudice, and may, if allowed to remain, prejudice his rights more than it has yet done. This view is, I think, in accordance with the principle of the decision in *Morris* v. *Bicketl*, and in the earlier case of *Menzies* v. *Earl of Breadalbane* (H.L.), 13 W. & S. 235. In expressing myself as I have done, I am not to be held as entertaining any opinion against the view that the preponderance of the evidence is to the effect that the whole embankment is erected *in alveo*.

In the second place, I think it is not established that the embankment is *innocuæ utilitatis*. On the contrary, I think it is established, and established beyond doubt, that the embankment threatens injury to the pursuer's rights, and will do serious injury to those rights if allowed to remain where it is. It may not be proved—I do not think it is—that the embankment has caused the channels or rivulets, shown on the plan produced, running from A and C to B, across the base of the peninsula. But it is distinctly proved that since the erection of the embankment these channels have increased both in width and depth, and that such increase has been caused by the embankment. The pursuer's apprehension that the whole body of the river might or would be diverted to these channels within a comparatively short time is, in my view, by no means imaginary or fanciful. I think the pursuer has good ground for apprehending such an event if the embankment remains where it is. If such an event happened it would not cut off pursuer's fishing at the Black Scaup altogether, an injury to his rights which he certainly has both title and interest to prevent. I do not go further into the details of the case, as your Lordship in the chair has already done so fully. I am of opinion that the pursuer is entitled to prevail, and that the judgment appealed against should be affirmed.

The Court pronounced this interlocutor—

"Find in fact in terms of the findings in fact in the interlocutor of the Sheriff-Substitute of 16th June 1891: Of new ordain the defenders on or before the 20th day of January 1892 to remove the embankment complained of, and remit to Angus Elder, ship captain," &c.

Counsel for Appellants — Gillespie — Dundas — Fleming. Agents — Dundas & Wilson, C.S.

Counsel for the Respondents—Sol.-Gen. Graham Murray, Q.C.—Pitman. Agents—J. & F. Anderson, W.S.

Friday, December 11.

SECOND DIVISION.

[Sheriff of Lanarkshire.

NELSON *v.* THE LANARKSHIRE ROAD TRUSTEES.

Reparation—Fault—Road — Obstruction—Mud-Heaps left on Road.

Roadsmen in the ordinary discharge of their duty accumulated the mud raked off the Crow Road, in the neighbourhood of Glasgow, in heaps of from