should say in this country) be taken in execution, "then and in that case all such acts and deeds of contravention," words that clearly include acts of omission as well as commission (if it be said that omission is not an *act*, I would appeal to the very language I have used, "acts of omission," which is a very common expression)—"then and in that case all such acts and deeds of contravention are not only hereby declared to be void and null to all intents and purposes" (then just leave out the few following words and proceed), "but also the heir so contravening shall *ipso facto* amit, lose, and tine all right to the said lands and estate," &c. Now, what are the words that are said to create the doubt? They are these—"sicklike as if the same had never been made." Now, it is said that an act of *omission* cannot be *made*; and that therefore you must so construe these words as to confine them to acts of commission, which, although not very accurately, we may say are acts "made." To this there are two answers which are perfectly satisfactory to my mind, namely, first, that inasmuch as the words are "sicklike as if the same had never been made," and inasmuch as the word "same" applies to all the deeds and acts of contravention specified, and those deeds and acts include acts of omission as well as of commission, if the word "made" is not aptly used it is only that the party who prepared the deed has used a word incautiously that does not include everything that was intended. But I do not think that signifies at all, for if it applies only to acts and deeds properly so called, then I say, upon ordinary principles it must be read *reddendo singulos singulis*, that is, if there is any contravention, then the estate is to go over, the party is to lose the estate, such acts being void to all intents and purposes, "sicklike as if the same had never been made;" that is, as if the deed from which the contravention has arisen had never been done. And this latter construction applies exactly as well to the subsequent Latin instrument, the deed of investiture, as it does to the original deed of entail. Whether the Lord Ordinary arrived at the conclusion to which he came upon right grounds it is not material to inquire; but I think there is not the least doubt that the Lord Ordinary and the Court of Session both arrived at the proper conclusion, and therefore I have no hesitation in moving your Lordships to affirm the interlocutors appealed from.

Lord CHELMSFORD—My Lords, the words "sicklike as if the same had never been made" are in my opinion not explanatory or interpretative, but merely emphatic; and if you give a qualifying and restrictive sense to these words, then, although it is perfectly clear that acts as well as deeds of contravention were intended to be rendered null and void, you would have to strike the word "acts" entirely out of the irritant clause. The question is so very clearly put by the Lord Justice-Clerk that I can only adopt his language in expressing the same opinion. His Lordship says—"It rather appears to me that the words 'sicklike as if the same had never been made' are not only surplusage, quite unnecessary to the completion of the irritant clause, or to working out or explaining its meaning, but that the addition is neither intended, nor, according to the grammatical structure of the sentence, is it calculated to restrict what goes before it. I am well aware that it may not have been intended to restrict what goes before, and still it may have that effect according to the construction which is given to deeds of entail. But I think it is neither intended, nor, according to the proper grammatical structure of the sentence, is it calculated to have that effect. A declaration of irritancy which is followed by such words as "in so far as" would be very different, because a sentence introduced by the words "in so far as" clearly imports a limitation of what goes before. And in like manner, if you were to say that all acts and deeds "are to be irritated to this effect that," you would then limit what goes before by that which follows. But I think the true purpose of the words "sicklike as if" is not to limit what goes before, but that it is an attempt to expound by an illustration the meaning of that which goes before." That is very clearly expressed. I entirely agree with it, and I think your Lordships ought to affirm the decision of the Court below.

Lord WESTBURY—My Lords, I have nothing to add to the judgments of the Court of Session. I think those judgments are extremely satisfactory, and that both the Lord Ordinary and the Judges of the Second Division have arrived at the right interpretation of the language of this entail.

Interlocutors affirmed and appeal dismissed with costs.

Agents for Appellant — Scott, Moncrieff, & Dalgety, W.S., and Connell & Hope, London.

Agents for Respondent—Thos. Ranken, S.S.C., and Tatham & Procter, London.

Friday, July 13.

BICKET *v.* MORRIS *et uxor.*

(In Court of Session, 2 Macph. 1082.)

Property—Running Water—Common Interest—Building in alveo—*Acquiescence.* (1) A proprietor on the bank of a running stream is not entitled to make an erection in the *alveus* which causes an obstruction to the current, and an adjacent proprietor may obtain interdict or removal of the erection without alleging or proving immediate damage; (2) circumstances in which held that a plea of acquiescence was not well founded.

Process—Appeal to House of Lords—Competency. In a case which was one of the class appropriated to the Jury Court by the Judicature Act, but in which the proof had been of consent taken on commission, an appeal to the House of Lords held competent, in respect the respondents had themselves reclaimed from the Lord Ordinary to the Inner House, and were thus barred from objecting to the competency.

This was an appeal from an interlocutor of the Second Division of the Court of Session. The parties are proprietors of premises in Kilmarnock, both of which front the Water of Kilmarnock, those of the appellant being on the north bank, and those of the respondent on the south. Prior to the year 1860 there were, amongst other tenements on the north bank of the water, one belonging to the appellant Mr Bicket, another occupied as a cooperage, and another known as "Miller's House," which latter was the highest up the bank, and extended some three or four feet into the river beyond the adjoining tenements mentioned. In that year Mr Bicket contemplated purchasing the ground occupied as a cooperage, pulling down the old buildings which occupied it, and erecting new ones. He alleges that the back wall of the cooperage, which was in a very ruinous condition, had a very broad foundation—extending into the

river as far as "Miller's House"—from which it rose with a very great slope. In case of purchasing this cooperage it was part of his plan to build a new wall, which would rise perpendicularly from the foundation of the old one, and in a line with "Miller's House." To avoid any subsequent objection on the part of the respondent, who, as already mentioned, is the owner of premises on the opposite bank of the water facing those of the appellant, he communicated his intention to him, and having received an assurance that no objection would be offered, purchased the ground and commenced building operations. Some time thereafter Mr Morris interfered. Whether he did so because the buildings were being carried further into the water than he had agreed might be done or not is matter of dispute. The parties, however, had various communications upon the subject, and the result was an agreement that, in consideration of a payment of £10, the appellant should be permitted by the respondents to build up to the limit indicated by a red line drawn on two copies of the Government Survey maps. The appellant then proceeded with his building operations, and alleges that he had completed the wall and roofed in the buildings he had erected, and that before the eyes of the respondents, when the latter complained that the wall encroached further upon the river than had been agreed to, and demanded liberal compensation for the injury thereby sustained. The appellant having denied that there was any deviation from the limit assigned, the respondents on 4th December 1861 presented a note of suspension and interdict to the Court of Session, setting forth that Mr Bicket having carried his buildings several feet further into the channel of the river than the line agreed upon indicated, was interfering with the *solum* of the channel and diverting the course of the stream, and that there were reasonable grounds for believing that he intended to encroach still further. Their Lordships were therefore prayed to prohibit the appellant from making any further encroachment, and to ordain him to take down and remove the buildings he had erected beyond the limit agreed upon. The appellant denied that he had encroached as alleged, and that he had any intention of carrying his buildings still further into the river.

The Lord Ordinary on the Bills (Lord Mackenzie) passed the note to try the question, but refused the interdict. On the 21st May 1862 the complainer raised an action of declarator against the respondents, concluding that the encroachment should be declared illegal, and that the appellant should be ordained to remove the buildings; and a record having been made up and closed in both processes, they were upon the 16th of July in the same year conjoined by interlocutor of Lord Jerviswoode (Ordinary). Before closing the record in the declarator, his Lordship by interlocutor of date 3d July 1862 repelled the 4th and 9th pleas-in-law for the respondent in the suspension, in so far as maintained to the effect that the note of suspension and interdict was incompetent, and ought *de plano* to be refused. These pleas were to the effect (the 4th) that the buildings having been erected and finished before the action was raised, it was in consequence excluded, and the note fell to be refused as incompetent; and (the 9th) that the complainers having judicially admitted that the buildings were finished before the action was raised, the note fell to be refused *de plano*. The ground upon which his Lordship repelled them was that he considered that the first portion of the prayer was directed, not against buildings already erected, but against any further encroachment. On the 16th of July Lord Jerviswoode, as already mentioned, conjoined the processes, and also allowed to both parties a proof of their respective averments. A proof having been led, his Lordship on the 17th of June 1863 pronounced an interlocutor finding that the complainers and pursuers had failed to prove that the respondent and defender had encroached upon the *solum* of the Water of Kilmarnock beyond the limit indicated by the red line on the Ordnance Survey map. He therefore repelled the reasons of suspension and interdict, and refused the prayer of the note, and also assoilized the defender from the conclusions of the summons of declarator. Against this interlocutor the pursuers reclaimed, and on 18th March 1864 the Second Division found that in constructing the buildings complained of the defender had not complied with the arrangement by which the pursuers consented to a partial extension into the river of the defender's river wall. On the 20th of May following they found further that the erection complained of had the effect of diverting the flow of water, and was therefore an illegal encroachment on the rights of the pursuers, and accordingly found and declared, decerned and ordained, interdicted, prohibited, and discharged, in terms of the conclusions of the summons, and in the suspension and interdict sustained the reasons of suspension, suspended and interdicted as prayed, and declared the interdict perpetual. Against these interlocutors the present appeal is brought.

A preliminary objection was taken to the *competency* of the appeal upon the ground that the action was one on account of injury to land where the title was not in question. Such an action is by the 28th section of the Judicature Act appropriated to the Jury Court for trial.

Mr Rolt, Q. C., Mr Anderson, Q. C., and Mr Alex. Blair (of the Scotch bar), appeared for the appellant; and the Attorney-General (Sir Roundell Palmer, Q.C.) and Mr Orr Paterson (of the Scotch bar), for the respondents.

Mr ROLT, on the part of the appellant, submitted —first, that it was necessary in a case like the present to allege and prove damage.

Lord WESTBURY—The proposition of law, according to the interlocutor, is that if a building projects the one-hundredth part of an inch into the river it is an illegal encroachment, and should be directed to be pulled down.

Mr ROLT said that was so.

Lord WESTBURY—We should not interfere here unless the encroachment were material. Does the law of Scotland differ in that respect from the law of England?

Mr ROLT said he believed there was no difference.

Lord WESTBURY—We have a common sense doctrine in England that a prohibition may issue against a person while in the act of committing a wrong, put that for a wrong already committed he shall be liable in an action for damages. Is that common sense doctrine incorporated in the law of Scotland?

Mr ROLT said it was, and proceeded to read a case exactly in point, which, he said, had just been handed to him by his learned friend Mr Anderson.

Lord WESTBURY—I would rather trust to the innate good sense of the doctrine than to any illustration of it.

Mr ROLT submitted next that according to the agreement the buildings complained of were

within the prescribed limits. He then proceeded to observe upon the distinction between rights arising from common property and from common interest. The parties in the present case were each absolute proprietor *ad medium filum*, with a common interest in the whole stream. The maxim *in re communi melior est conditio prohibentis* had no application to common interest. (Bell's Principles, 1086; Menzies *v.* Earl of Breadalbane, 3 W. S. 235; Magistrates of Aberdeen *v.* Menzies, M. 12,787; Farquharson *v.* Farquharson, M. 12,779; Morris *v.* Miller, 7 S. J. 77.) In the next place, the respondent had acquiesced in the erection of these buildings; they were all roofed in before the suspension was brought.

Lord WESTBURY—If the doctrine of acquiescence be unknown to Scotch law, and it be also in a case like this unnecessary to show that the encroachment is injurious, and the simple relief applicable is the removal of the building, that right may be exercised at any time.

Mr ROLT said the doctrine of acquiescence was as well known in Scotch as in English law. Then, lastly, as regarded the competency of this appeal, it was objected that the action in the present case was one of those enumerated in the Judicature Act, and appropriated to jury trial. All doubt upon that point must be set at rest by the 49th section of the 13 and 14 Vict. cap. 36, which provided that it should be competent for the Court to allow proof on commission in any of the enumerated causes where the action was not for libel or nuisance, or properly and in substance an action of damages. Now this was not an action for damages—none were claimed; nor was it an action on account of a nuisance.

Lord WESTBURY—At all events, the interlocutor does not so regard it.

Mr ROLT said, moreover, it was a cause in which a question of title was involved.

The LORD CHANCELLOR—A question of right undoubtedly. Is that included under the term question of title?

Mr ROLT submitted it was.

Lord CHELMSFORD—Supposing the Judges wrong in thinking it was unnecessary to show damage, the question of competency would not arise.

Mr ROLT submitted further that if the appeal to their Lordships was incompetent, the reclaiming-note to the Inner House was equally so, so that the interlocutor of the Lord Ordinary, which was in favour of the appellant, was final and conclusive. He was sure the pursuers in a case so paltry and so degrading to law would receive no favour from their Lordships, and submitted that the interlocutor was wrong, and ought to be reversed.

Mr ANDERSON, Q.C., followed Mr Rolt on the part of the appellant, and submitted, first, that this was not one of the causes enumerated in the Judicature Act; but if included in that Act, it was an action on account of injury to property.

The LORD CHANCELLOR—It is a matter for discussion whether a question of title involves a question of right.

Mr ANDERSON—In the next place, supposing this were one of the enumerated causes, then it was incompetent for the respondents to reclaim against the Lord Ordinary's interlocutor, which therefore became final and conclusive in favour of the appellant. In the second place, he submitted that there was an entire want of evidence to establish that the appellant had exceeded the limits agreed upon, and referred to the evidence in support of this proposition. In the third place, this was *damnum absque injuria;* if any consequence had resulted from the alleged encroachment, it was an improvement in the flow of the stream, but the Court below had laid down the proposition that it was unnecessary to prove damage.

The LORD CHANCELLOR—What distance to the right and left of a point immediately opposite would the word "opposite" include?

Lord WESTBURY—Supposing you erect a post on the shore of a river, and I occupy property two or three hundred miles above it, the proposition of the Court below is that I am entitled to have it removed.

The LORD CHANCELLOR—If it were necessary to qualify damage, then the proprietors included in the term "opposite" would be easily ascertained.

LORD WESTBURY—Is it physically possible that any encroachment could effect the flow of water immediately opposite that encroachment?

Mr ANDERSON thought certainly not, and said that the respondent's premises were actually above the point of encroachment. In the next place, the maxim, *in re communi, potior est conditio prohibentis*, applicable to common property, had no application to common interest (Bell's Principles, 1074).

Lord CHELMSFORD—Is there any common property in gables in Scotland?

Mr ANDERSON said that the tenant of a flat had a common property in the gable which enclosed that flat, but had also a common interest in the gables which enclosed the other flats of the same tenement. He then proceeded to refer to the cases of Farquharson *v.* Farquharson, the Magistrates of Aberdeen *v.* Menzies, and Menzies *v.* Breadalbane, which had been relied upon in the Court below, but which, he submitted, had no application to the present case.

Lord WESTBURY—The judgment of the Court below proceeds upon the assumption that there is tenancy in common in water as there is in land.

Mr ANDERSON said that was so, and the distinction, moreover, between common property and common interest had been entirely ignored.

Lord WESTBURY—In Farquharson *v.* Farquharson the dividing of a stream, or the checking of its course, was declared to be illegal, but for the reason that either would have been prejudicial to other parties.

Mr ANDERSON said next, if any wrong had been committed towards the respondents their proper and only remedy was an action for damages. He referred to M'Nair *v.* Cathcart (Fac. Dec., 18th May 1802), and said, moreover, that the respondent having estimated the loss to his property at the amount of £10, on account of a certain encroachment, the damage he had sustained by a further encroachment of a few inches was not easily appreciable. Lastly, upon the point of acquiescence, he referred to numerous cases to show that that doctrine was as fully recognised by the law of Scotland as by that of England.

The LORD CHANCELLOR—There is no doubt that the respondent was aware of a building being erected, but is there anything to show that he was aware that building was being carried beyond the limit he had agreed to?

Mr ANDERSON thought the correspondence between the parties sufficiently showed that, and in conclusion submitted that the respondent had most improperly instituted and continued this litigation.

The ATTORNEY-GENERAL, on the part of the respondents, said that the time of the House had been

most unnecessarily occupied. The appeal was entirely incompetent. The statute 6 Geo. IV., sec. 28, declared that actions for libel, nuisance, and on account of injury to land, where in the latter case no question of title was involved, should be appropriated to jury trial. This was certainly an action on account of injury to land, though the summons did not conclude for damages.

Lord WESTBURY—The right to use land in a certain way is included in the word title.

The ATTORNEY-GENERAL said he thought certainly not.

Lord WESTBURY—You must understand the word "title" in the Scotch sense.

The ATTORNEY-GENERAL was not aware that the sense of the word was different in Scotland.

LORD WESTBURY—You say this is a cause appropriated to jury trial. What issues would have been sent to a jury?

The ATTORNEY-GENERAL said they were to be found in the third plea of the respondents, the first part of which asserted that the appellant was not entitled to make any encroachment without the consent of the respondent.

Lord WESTBURY—That is a question of law, and not of fact.

The ATTORNEY-GENERAL said the second issue, according to the plea, would be whether the encroachment complained of was injurious to the respondent.

Lord WESTBURY—And *that* the Court of Session has declared to be quite immaterial.

The ATTORNEY-GENERAL said that his learned friends on the other side had misrepresented both his arguments and the law laid down by the Court of Session on that subject. He referred to the pleadings and to the evidence to show that damage was both alleged and proved. Further, this might well be considered an action brought for the removal of a nuisance, which was also one of the enumerated causes.

Lord WESTBURY—If this be one of those causes, does not your having reclaimed from the interlocutor of the Lord Ordinary debar you from taking any objection to the competency of an appeal to this House?

The ATTORNEY-GENERAL said that he thought that was not a sound view of the effect of their procedure. By consentiug to have a proof taken by commission, neither party had any intention of excluding the adjudication of the Inner House. He then proceeded to point out that it was a monstrous proposition that a number of riparian proprietors might make encroachments on the giver, and that other proprietors should not be entitled to interfere unless they could demonstrate the particular damage.

The LGRD CHANCELLOR—Yor must not set up anything which will sensibly affect the flow of the water.

The ATTORNEY-GENERAL said it was impossible to tell in certain cases what the effect of an encroachment was.

Lord WESTBURY—Your proposition is that it is a *presumptio juris* that damage arises from an encroachment, and is unnecessary to be proved.

The ATTORNEY-GENERAL said he submitted that that was a correct view, but in the present case damage had been both alleged and proved. In the next place, upon the question of the agreement, the correspondence clearly showed close and reluctant bargaining on the part of the respondents, and the other evidence established the violation of the agreement by the appellant.

Lord CHELMSFORD—Do you think, Mr Anderson, you can contend that you have not exceeded the limit stipulated for in the agreement?

Mr ANDERSON thought he certainly could.

The ATTORNEY-GENERAL went on to comment upon cases of Magistrates of Aberdeen *v.* Menzies, Farquharson *v.* Farquharson, and Menzies *v.* Breadalbane, which he said established that the proprietor on one side of a stream was entitled to prohibit erections *in alveo* by the proprietor on the opposite side, such operations necessarily involving interference with the stream. He concluded by submitting that the interlocutor of the Court below was right, and ought to be affirmed.

Mr W. A. O. PATERSON followed on the same side.

Mr ROLT, Q.C., then replied on the part of the appellant. He said it had been distinctly laid down by the House in Crawfurd *v.* Dickson (2 W. and S. 354) that when no damages were claimed the cause was not one of those appropriated to jury trial by the Judicature Act. A jury had no function to perform if they were not asked to assess damages. Further, a reference to the pleadings abundantly showed that this was regarded as a question of title—the words "right or interest" were continually employed. Next, it was necessary to establish damages; that was the essence of the case. The agreement had not been violated, and the respondent had acquiesced in the building being erected.

The debate was concluded on 4th May, when the Lords took time to consider their judgment.

Judgment was given to-day.

The LORD CHANCELLOR (Chelmsford) — My Lords, the first question to be considered is the competency of the present appeal. It appears to me that this is one of the actions "appropriate to the Jury Court," under the 28th section of the Scotch Judicature Act, 6th George IV., chap. 120, being an action on account of an injury to land in which the title was not in question. By the word "title" I do not understand to be meant the right to do the act which occasioned the injury, but the title to the land itself to which the injury is alleged to be done.

In this case the complaint is, that the defender encroached by building beyond a certain line upon the *solum* of the river called the Water of Kilmarnock, opposite the pursuer's property. It is in respect of his property in the land that the pursuer disputes the right of the defender to encroach upon the river; but the title to the land affected by the encroachment is not at all in question. It was contended by the appellant that there being no claim for damages in the pursuer's summons, it was a case not within the 28th section of the Judicature Act; but it seems to me that this section is not confined to cases where damages are demanded, but that it extends to all the enumerated causes of action where a question of fact is to be tried, proper for the determination of a jury. The cause ought therefore in regular course to have been remitted to the Jury Court, and the Lord Ordinary had no authority to order the proofs to be taken by commission.

But it was quite competent to the parties to agree that the proof should be taken by commission instead of by a jury; and this having been done, the question arises, whether the case was not removed from the regular course of proceeding, so that it could no longer be regarded as a trial *in curia*, and subject to appeal.

It is unnecessary to consider the 49th section of the 13th and 14th Vict., chap. 36, allowing the Lord Ordinary to take evidence by commission in causes

not "specially enumerated" in the 6th George IV., "as appropriate to be tried by jury," because I have already expressed my opinion that the present cause is one of those enumerated in that Act.

Whether, after having consented to the proof being taken by commission and reported to the Lord Ordinary for his decision, the parties had precluded themselves from presenting a reclaiming note to the Inner House, is a question which it appears to me to be unnecessary to decide. The pursuer having failed before the Lord Ordinary, himself carried the cause into the Inner House by reclaiming note, thereby asserting his right to appeal from the Lord Ordinary's interlocutor. Having obtained from the Court of Session an interlocutor reversing the interlocutor of the Lord Ordinary, it would be opposed to every notion of propriety and justice if the pursuer could successfully resist the defender's right to question the interlocutor upon the ground of incompetency. By taking the step of appealing to the Inner House, the pursuer, in my opinion, has precluded himself from objecting that the interlocutor pronounced in his favour is not subject to all the consequences of other interlocutors, and therefore appealable to this House.

The next question to be determined is one of fact, namely, whether the appellant has extended his buildings beyond the line permitted by the agreement. Upon this subject the evidence is conflicting, and impossible to be reconciled. The whole difference between the parties depends upon the fact, whether the letter D on the plan given in evidence accurately represents the junction between the new wall and the old. If it does, then the new wall is properly represented by the blue line, and there has been an encroachment beyond the agreed limit. If, on the contrary, the letter C on the red line is the point at which the new wall strikes the old, then the defender is within the limit prescribed by the agreement. Both parties agree that for a certain part of the new building the foundation of the old wall has been used. This being so, and the building running in a straight line throughout its length, I do not well see how any other than the blue line can be taken to represent the extent of the encroachment. The Judges of the Second Division have come to this conclusion, and even if I were disposed to form a different opinion from them, I should be very unwilling to overrule their judgment upon a question of fact of so doubtful a nature. I therefore assume as an established fact that the appellant has exceeded the limit conceded to him by the agreement.

The important question in the case is, whether the respondents were entitled to a declarator that "the defender had no right or title to erect any building, or otherwise to encroach upon or to interfere with that part of the *solum* of the river called the Water of Kilmarnock, which is immediately opposite the pursuer's property beyond a certain line, and to a decree ordering the defender to take down and remove the buildings or other erections, in so far as these extend into or encroach upon the *solum* of the river beyond the said line," and interdicting him from erecting "any building, or otherwise encroaching upon the *solum* of the river beyond the line in question."

There is a general statement in the pleas in law of the encroachments complained of being "injurious to the pursuer's property," but no proof was given by him of any actual injury, but only a probability of injury from the building being advanced further into the river than the line agreed upon. The result of the opinions of the Judges of the Second Division appears to me that a riparian proprietor has no right to erect any building *in alveo fluminis*, and that, if he does so, although the opposite proprietor may be uuable to prove that any damage has actually happened to him by the erection, yet, if the encroachment is not of a slight and trivial but of substantial description, it must always involve some risk of injury. Lord Benholme said, "Without my consent" (*i.e.*, the consent of the proprietor of the other side of the river), "you are not to put up your building in the channel of ths river, for that in some degree must affect the natural flow of 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 can qualify damage or not." And Lord Neaves said, "Neither can any of the proprietors occupy the *alveus* with solid erections without the consent of the other, because he thereby affects the course of the whole stream. The idea of compelling a party to define how it will operate upon him, or what damage or injury it will produce, is out of the question."

These views appear to me to be perfectly sound in principle, and to be supported by authority. The proprietors upon the opposite banks of a river have a common interest in the stream, and although each has a property in the *alveus* from his own side to the *medium filum fluminis*, neither is entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water. My noble and learned friend the late Lord Chancellor, during the argument put this question. "If a riparian proprietor has a right to build upon the stream, how far can this right be supposed to extend? Certainly (he added) not *ad medium filum*, for, if so, the opposite proprietor must have a legal right to build to the same extent from his side." It seems to me to be clear that neither proprietor can have any right to abridge the width of the stream, or to interfere with its regular course, but anything done *in alveo* which produces no sensible effect upon the stream is allowable.

It was asked by the counsel in argument whether a proprietor on the banks of a river might not build a boat-house upon it. Undoubtedly this would be a perfectly fair use of his rights, provided he did not thereby obstruct the river or divert its course; but if the erection produced this effect, the answer would be, that essential as it might be to his full enjoyment of the use of the river, it could not be permitted. *A fortiori*, when the act done is the advancing solid buildings into the stream, not in any way for the use of it, but merely for the enlargement of the riparian proprietor's premises, it must be an infringement upon the right and interest of the proprietor on the opposite bank.

Upon principle, then, the pursuer had a cause of action in respect of the defender's building, and was entitled to a declarator against the encroachment, and a decree to have the obstruction removed. The authorities cited in the argument at the bar support the principle, and establish a satisfactory distinction. The proprietors on the banks of a river are entitled to protect their property from the invasion of the water by building a bulwark, *ripæ muniendæ causa;* but even in this necessary defence of themselves they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite side of the river. In this case, mere apprehension of danger

will not be sufficient to found a complaint of the acts done by the opposite proprietor, because, being on the party's own ground, they were lawful in themselves, and only became unlawful in their consequences upon the principle of *sic utere tuo ut alienum non lædas.* But any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor, and therefore, the act being *prima facie* an encroachment, the *onus* seems properly to be cast upon the party doing it to show that it is not an injurious obstruction.

There only remains the question of acquiescence to be considered. There is no doubt as to the principle of the cases of persons standing by and permitting acts to be done which they are entitled to prevent. It is only just that a person who has been encouraged to continue expensive operations by the seeming consent of him who might have stopped them, should be able to defend himself against a subsequent attempt to treat them as an encroachment upon the rights of the party who has so misled the other into the confidence that his acts were sanctioned; but in all such cases knowledge of the acts done is essential to stop the party who has suffered the encroachment upon his rights from afterwards objecting to it. In this case there was an agreement between the parties, and it does not appear that the pursuer knew at first that the defender was exceeding the limits prescribed by the agreement. As soon as he was aware of the fact, he objected to it. The defender, however, chose to go on in the face of the pursuer's objection. His proper course would have been to have suspended his works until it could be ascertained whether he had kept to the permitted line or not. If he determined to proceed in spite of the objection, it is difficult to understand how he can now claim the benefit of the principle of acquiescence, or how he can reasonably complain that he is compelled to reduce his building within the limits agreed upon.

My Lords, for these reasons I think that the interlocutor of the Second Division ought to be affirmed.

Lord CRANWORTH—My Lords, there is no doubt that the respondent agreed with the appellant that to a certain extent he would not object to his advancing his building into the bed of the river, so that, if the limit to which that agreement extended has not been transgressed, there can be no ground of complaint on the part of the respondent. If the limit has been transgressed, then there arises a second quesiton—namely, whether, independently of any agreement, the appellant had not by the law of Scotland a right to erect the buildings which he has erected in the *alveus* of the river. In the hearing of this case at your Lordships' bar, the two questions were argued in the order in which I have just stated them—that is, first, whether the appellant's buildings had been carried further into the river than the line agreed to by the respondent; and secondly, whether by the law of Scotland there was anything to prevent the appellant, independently of consent, from erecting the buildings in question.

I will take a different course and consider first what rights the appellant had, independently of contract or consent.

By the law of Scotland, as by the law of England, when the lands of two conterminous proprietors are separated from each other by a running stream of water, each proprietor is *prima facie* owner of the soil of the *alveus* or bed of the river *ad medium filum aquæ.* The soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty—so that, if from any cause the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the *alveus*, each of them up to what was the *medium filum aquæ* in the same way as they were entitled to the adjoining land. The appellant contended that, as a consequence of this right, every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the *alveus*, so long as other proprietors cannot show that damage is thereby occasioned or likely to be occasioned to them.

I do not think that this is a true exposition of the law. Rivers are liable at times to swell enormously from sudden floods and rain, and in these cases there is danger to those who have buildings near the edge of the bank, and indeed to the owners of the banks generally, that serious damage may be occasioned to them. It is impossible to calculate or ascertain beforehand what may be the effect of erecting any building in the stream so to divert or obstruct its natural course. If a building should be carried out to the middle of the stream, that is, to the whole extent of the proprietor's right in the *alveus*, no one can fail to see that there might be great danger in case of floods. If the proprietor on one side can make an erection far into the stream, what is there to prevent his opposite neighbour from doing the same?

The most that can be said in favour of the appellant's argument is, that the question of the probabilities of damages is a question of degree, and so if the building occupies only a very small portion of the *alveus*, the chance of damage is so little that it may be disregarded. But this is an argument to which your Lordships cannot listen. Lord Benholme says truly that what may be the result of any building in the *alveus* no human being knows with certainty. The owners of the 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 all have a common interest. There is in this case, and in all such cases there ever must be, a conflict of evidence as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testamony. They are allowed to say, We have all 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.

It was said in argument, then, if I put a stake in the river, am I interfering with the rights of the riparian proprietors? To this I should answer, *De minimis non curat prætor.* But, further, it might be demonstrated in such a case, not that there was an extreme improbability, but that there was an impossibility of any damage resulting to any one from the act. It is, however, unnecessary for us to speculate on any such infinitesimal obstruction. No one can say that in this case the extent to which the appellant has built into the river is so small as to be, like the case of a stake driven into the soil, inappreciable.

My Lords, I will only add, that I find nothing in the cases or text-books to which we were referred at variance with the view I have taken of the law; and the cases of the Town of Aberdeen *v.* Menzies and Farquharson *v.* Farquharson, cited by

the Lord Justice-Clerk, are in exact conformity with it. I therefore come without hesitation to the conclusion that the appellant had no right, independently of contract or consent, to build, as he has built, into the bed of the river.

That being so, the only other question is, whether what the appellant has done has been done with the sanction or acquiescence of the respondent. For if it has, then whatever may be the rights of other proprietors on the banks of the river, it does not lie in his mouth to complain. This is a mere question of fact, and must be decided by an examination of the evidence. I have given to the proofs on both sides my best attention, and the conclusion at which I have arrived is the same as that of my noble and learned friend on the woolsack.

The burden of proof was clearly on the appellant. He has erected a wall which *ex hypothesi* by the law of Scotland he was not justified in erecting. But then he says to the respondent—You cannot be heard to complain of what I have done, for you agreed that I should be at liberty to do it. You in substance sold to me your right to make the objections you are now making. The appellant, in order to sustain this case, must show first, what his agreement with the respondent was, and secondly, that what he has done was warranted by that agreement.

As to the agreement itself, it is to be found in the letters that passed between the parties at the end of May 1861, set out in the appendix, pages 147, 148, and 149, from which it is plain that in consideration of a sum of £10 the respondent agreed, so far as he was concerned, to permit the appellant to build his wall from the point marked A to that marked C on the Ordnance map. This is confirmed by the evidence of Thomas Fulton, the appellant's agent, at page 118. In fact, the wall which has been built is a wall from the point A to the point D on that map. It was incumbent, therefore, on the appellant to show that the point C is a point on the line A D. It has never been contended that the point C is a point further into the stream than the line A D, and if it is nearer the north bank than the line A D, it is certain that in building along that line the appellant must have transgressed the limit for which he had contracted with the respondent.

Now, according to the map, the point C is considerably within the line A D. Mr Gale says that a perpendicular line drawn from that point to the line A D measures 2 feet 9 inches, and that the area embraced by that line and the lines A C and C D amounts to 73 square feet. The appellant endeavours to meet this evidence by showing that the Ordnance map is incorrect—that whereas the point C is there represented as nearer to Bank Street than the line A D, it ought to have been placed on that line, and in confirmation of this hypothesis he relies, amongst other things, on the testimony of workmen engaged in building the actual wall, who say that when they came to the old wall, which it is contended must be the point C, they continued to build on the line of the old foundations. And from this the inference is drawn that the actual wall has not gone beyond the line stipulated for.

To this, however, there are two answers—First even assuming, as I do, that the witnesses have no intention to deceive, yet looking to the nature of the old buildings, and the great slope or batter in the walls, which we are told existed I cannot feel satisfied that the foundations of which the witnesses speak might not have been foundations of a wall sloping to the north-east, as described on the map. But, further, it must be borne in mind that the contract into which the respondent entered was a contract founded on the map—a contract that the appellant might build on a line ascertained by the map. If the map does not accurately represent the old buildings as they actually existed, it might have been open to either party to contend that the contract was not binding. But such an error cannot justify one of the contracting parties in saying to the other—You have agreed to give me certain privileges up to a point in your property, as marked C on a map. I find the map is incorrect. The point C ought to have been differently placed, and I shall hold you bound to give me the privileges in question, up to the point according to what the map ought to have been.

I am therefore of opinion, with my noble and learned friend, that the appellant has failed to show that the respondent had bound himself not to object to the line of wall actually built.

With respect to the question raised by the appellant as to acquiescence, I have only to say that I concur with my noble and learned friend on the woolsack. On the point of competency, it is not necessary to give an opinion, as our decision is in favour of the respondent; but had this not been so, I should have been very slow to hold that the pursuer, having himself presented a reclaiming note to the Inner House, and obtained the benefit there of a decision in his favour, reversing that of the Lord Ordinary, can now say—I will profit by that which is in substance an appeal to the Inner House, and treat that as a regular proceeding *in curia*, and yet hold that an appeal from that decision is *ultra vires*. This question, however, as I have already stated, does not arise.

Lord WESTBURY—My Lords, Upon the question of competency it must be understood that the decision of your Lordships proceeds upon its being personally incompetent to the respondent to raise that objection.

This is a case of very considerable importance, because, so far as I know, it will be the first decision establishing the important principle that a material encroachment upon the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor, without the necessity of proving either that damage has been sustained or that it is likely to be sustained from that cause. The examination that has been given at the bar to the cases cited upon that point of law certainly had led me to the conclusion that it has not yet been clearly established by decisions. I have felt much difficulty upon it, because undoubtedly a proposition of that nature is somewhat at variance with the principles and rules established on the subject by the civil law. I am, however, convinced that the proposition, as it has been laid down in the Court below, and as it has received the sanction of your Lordships in your judgments, is one that is founded in good sense, and ought to be established as matter of law.

My Lords, When it is said that proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not by any means follow that that property is capable of being used in the ordinary way in which so much land uncovered by water might be used, but it must be used in such a manner as not to affect the interest of riparian proprietors in the stream. Now, the interest of a riparian proprietor in the stream is not only to the extent of preventing its being diverted or dimi-

nished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor.

My Lords, if we attend to the subject for a moment, it will occur to everyone that in the bed of a river there may possibly be a difference in the level of the ground which, as we know, has the effect of directing the tide or current of the river in a particular direction. Suppose the ordinary current flows in a manner which has created for itself by attrition a bay in a particular part of the bank, if that were obstructed by a building, the effect might be to alter the course of the current so as to direct the flow with a greater degree of violence upon the opposite bank, or upon some other portion of the same bank, and then, it will immediately occur to your Lordships that if at that part of the bank to which the accelerated flow of the water in greater force is thus directed there happens to be a building erected, the flow of the water thus produced by the artificial obstruction would have the effect possibly of wearing away the foundation of that building at some remote period, and would thereby be productive of very considerable damage.

It is wise, therefore, in a matter of that description, to lay down the general rule that, even though immediate damage cannot be described, even though the actual loss cannot be predicated, yet if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury in the sense that it is a matter which the Courts will take notice of as an encroachment which adjacent proprietors have a right to have removed. In this sense the maxim has been applied to the law of Scotland that *melior est conditio prohibentis*—namely, that where you have an interest in preserving a certain state of things in common with others, and one of the persons who have that interest in common with you desires to alter it, *melior est conditio prohibentis*—that is to say, you have a right to preserve the state of things unimpaired and unprejudiced in which you have that existing interest.

My Lords, upon these grounds I entirely concur with your Lordships and with the Court below in the conclusions at which you and they have arrived.

Upon the other part of the case, however, there is a matter which has given me very much anxiety, because I foresee that it may, as between these parties, be the source of much future litigation. I agree with your Lordships that it was incumbent on the appellant to prove that what he has done fell within the limits of his agreement; and I also concur with your Lordships that that obligation has not been discharged by him. Now, we have arrived at that conclusion, as the Court below did, from the difficulty of ascertaining whether the buildings actually erected do or do not coincide with the limit laid down on the plan to which the agreement between the parties refers. I observe, however, that the final interlocutor grants and makes perpetual an interdict in conformity with the conclusion of the summons, which conclusion is in effect thus worded:—That the pursuer shall be entitled to have removed, and to have in continuance interdiction of so much of the building as transcends the red line. And, accordingly, the interdict being thus granted, on the application of that interdict, the same question which we have found it impossible to solve will again recur.

It may be said, and perhaps truly said, that if that difficulty hereafter arises, it will be due entirely to either the misconduct of the present appellant or to the inability of the present appellant to justify what he has done, by proving that it distinctly falls within the limits of the agreement, and I am compelled to accept that answer as a sufficient ground for acquiescing in the interlocutor. I trust, however, that the experience of the past will render the parties to this matter disposed to take some course consistent with reason and moderation on either side, and that that may prevent the further litigation which unquestionably is involved in granting an interdict of the description which I have mentioned, which involves an unknown quantity, or at least a quantity of fact that cannot at present be ascertained.

My Lords, with respect to acquiescence, undoubtedly the respondent had a right to assume, when the buildings were at first commenced and during their prosecution, that they were constructed in conformity with the agreement, and we find that when his attention was called to the fact that the agreement had been violated, there was no delay on his part in remonstrating and protesting against what had been done. There has therefore been nothing like acquiescence which would debar him from the ordinary remedy.

My Lords, on these grounds, and at the same time regretting in some degree that we are obliged to deal with this case in a way which, if there be the same spirit of litigiousness as has hitherto prevailed, may possibly create further annoyance, I concur with your Lordships in thinking that this interlocutor must be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Agents for Appellant—Hunter, Blair, & Cowan, W.S., and Preston Karslake, London.

Agents for Respondent—Duncan & Dewar, W.S., and Loch & M'Laurin, London.

COURT OF SESSION

Friday, July 20.

SECOND DIVISION.

SIR WILLIAM STIRLING MAXWELL *v.* THE COMMISSIONERS OF INLAND REVENUE.

Stamp Duty—Personal Bond—Marriage-Contract—Security. Held that a provision in a marriage-contract of £15,000, £20,000, and £30,000, in favour of children, according to the number that might be born, and in security of the payment of which the husband conveyed his estate to trustees, was a bond for a definite sum of money, and therefore liable in *ad valorem* stamp duty.

This was a special case, prepared by the Commissioners of Inland Revenue at the request of Sir William Stirling-Maxwell, in terms of the provisions of 28 and 29 Vict., cap. 96, sec. 2. The Commissioners state the following circumstances:—By antenuptial contract of marriage Sir William Stirling-Maxwell, *inter alia*, bound and obliged himself, at the first term after his death, to pay to certain trustees for the child or children of the marriage, other than the heir, and the lawful issue of such as should predecease him, the following sums of money:—If one child, £15,000; if two children, £20,000; if three or more, £30,000, and he disponed his heritable estate