The Provost, &c., of Aberdeen, 18 D. p. 47, affirmed on appeal to House of Lords in 1858 (3 Macq. 116). Here there was some complication on the question of heritable property, but, as I have already said, there is no question of heritable property in the question now before us, and also the law is tending to this, not to carry the exception as regards heritable property very far. There is, too, the case of *Littlejohn* v. *Black*, Dec. 13, 1855, 18 D. 207, and the doctrine has more recently been illustrated in the English case of *Stapleton*. In short, about the general doctrine of *tantum et tale* there can be no doubt whatever, and we must apply it here unless there is anything in the Registration Acts absolutely requiring registration to make a bill of sale valid. But your Lordship has clearly shown that there is not, and I therefore cannot doubt that the claim of the son here is preferable to that of the trustee, and that therefore the prayer of the petition must be granted.

LORD MURE and LORD SHAND concurred.

The Court pronounced this interlocutor:—

"The Lords having considered the reclaiming note for John Watson junior against the interlocutor of Lord Adam, Ordinary, dated 24th June last, Recal said interlocutor, and declare that the four shares of the vessel 'John Watson' held by the petitioner under bill of sale dated 14th July 1875, followed by possession, belong to him in property, and are not vested in the respondent as trustee in the sequestration of the registered owner: Therefore grant interdict in terms of the prayer of the petition: Ordain the respondent to grant such deeds as may be necessary to procure the petitioner registered as the owner of the said four shares: Find no expenses due, and decern."

Counsel for Petitioner (Reclaimer)—Dickson. Agent—G. Andrew, S.S.C.

Counsel for Respondent—Pearson. Agent—A. Morison, S.S.C.

Saturday, July 19.*

SECOND DIVISION.

[Sheriff of Perthshire.

ROBERTSON *v.* FOOTE & COMPANY.

River—Right of Property—Alveus.

The right of property in the *alveus* of a stream belongs to the riparian owners just as any other proprietary right, subject only to the limitation that nothing be done capable of producing an alteration on the interests of other riparian proprietors, who need not qualify or establish actual injury to these interests in order to have any such operation *interdicted*.

River—Riparian Proprietor — Salmon-fishing—Removal of Boulders.

Twenty tons of ancient boulders and stones which interfered with the sweep of the salmon-nets in a river were removed by the tenants of the fishings by means of blasting by dynamite. *Held* that the opposite riparian proprietor was entitled to interdict against such operations *in alveo*, which were beyond those of an ordinary character, and were such as might possibly have a permanent or appreciable effect on the current, or might injure the rights and interests of the opposite proprietors.

The pursuer of this action, General Robert Richardson Robertson of Tulliebelton and Ballathie, was heritable proprietor of the lands and estate of Ballathie, and salmon-fishings thereof, situated on the right bank of the Tay. The Baroness Willoughby d'Eresby was proprietrix of the lands and estate of Stobhall, on the left bank of the Tay, opposite the pursuer's lands of Ballathie, and the defenders of the action, Andrew Foote & Company, and the individual partners of that company, were her Ladyship's tenants of the net-fishings *ex adverso* of Stobhall, one of the principal stations on which fishings was that known by the name of the "Pot Shot."

The pursuer averred—"(Cond. 4) About three weeks ago the defenders commenced operations on the *alveus* or bed of the river opposite the Pot Shot. These operations were carried on by means of three or more boats moored on the river and eighteen men. The defenders Alexander Foote, Peter Foote, and Laurence Christie alternately assumed a diving dress and proceeded to the bottom of the river, and there bored large stones and rocks, which were afterwards blown up by means of dynamite or other explosive substance. Chains were then attached to those stones and rocks, which were afterwards, by means of a windlass and platform placed upon two boats, deposited near the Stobhall shore, in the channel of the river." It was further stated that these operations, though at first confined to the defenders' own side of the river, were afterwards extended to the pursuer's side. "(Cond. 6) The effect of these operations may be very seriously to deteriorate pursuer's salmon-fishings both by net and rod, and to alter, divert, or change the course of said river opposite the pursuer's lands. The defenders have no right to conduct such operations, or to interfere in any manner of way with the *alveus* or bed of the river at the place mentioned, and the channel of the river ought to be restored to its former condition, so far as that can now be done." The pursuer therefore brought this action in the Sheriff Court of Perthshire to have the defenders interdicted "from proceeding further with the removal from the *alveus* or bed of the river Tay, opposite the fishing station called the Pot Shot, tenanted by them, of large stones and rocks, and from interfering in any way with said *alveus*; and also for an order upon them to restore the *alveus* to the condition in which it was at the time they commenced the operations after described."

The defenders admitted "that about the time mentioned they commenced operations to remove stones from the *alveus* or bed of the river at the 'Pot Shot,' and that these operations were carried on by means of boats and men, and that a diving dress was used by the defenders Alexander Foote and Peter Foote, who went to the bottom of the river, where they bored two stones, which were blown up with dynamite. Denied that any rocks were bored or blasted." They stated that the result of their operations was to permit the river to

* Decided 16th July.

flow more smoothly in its natural channel, and that they were necessary for their fishing. They further averred that "it has been the universal custom and practice in the river Tay, both in the tideway and above the tideway, from time immemorial, for the proprietors and tacksmen of salmon-fishings therein to remove boulders or stones from the bed thereof where they interfered with the operations in fishing for salmon." The other circumstances of the case as averred upon record, and as they appeared upon the proof which was led in the case, sufficiently appear from the interlocutor and note of the Sheriff (LEE) and from the opinions of the Court *infra*.

The Sheriff-Substitute (BARCLAY) assoilzied the defenders from the conclusions of the action, but on appeal the Sheriff (LEE) pronounced an interlocutor recalling the Sheriff-Substitute's interlocutor and finding as matter of fact—"*First*, In and about the month of June 1878 the defenders, as lessees of the salmon-fishings in the river Tay *ex adverso* of the estate of Stobhall, belonging to the Baroness Willoughby d'Eresby, were carrying on in the bed of the said river, at the place known as the 'Pot Shot,' certain operations for the removal therefrom of boulders and fragments of rock, in order to improve their fishings at said station: *Second*, The said boulders and fragments of rock were of large size, and had formed part of the bed of the river at that place from time immemorial, at least for many years prior to the date of the defenders' lease; and the salmon-fishings occupied by the defenders are not proved to have been exercised at any time free from the presence of the said boulders and fragments of rock: *Third*, The operations in question were conducted from boats moored together in the river, so as to form a platform; and consisted in sending a diver therefrom to work at said boulders or fragments of rock, to the effect of blowing them up by means of dynamite, after which the pieces were lifted by mechanical power on to the platform, and deposited near the side of the river, at a point marked C on the Ordnance plan produced: *Fourth*, The said operations were prejudicial to the interests of the pursuer as proprietor of the salmon-fishings *ex adverso* of his lands of Ballathie on the opposite side of the river, and the defenders have failed to prove that said operations were necessary to the proper working of the fishings leased by them, or that there is any custom on the river Tay permitting the use of such means for the improvement of a fishing station." And also finding, "in point of law, that the operations complained of are an illegal and unwarrantable interference on the part of the defenders with the *alveus* or bed of the river: Therefore repels the defences, and decerns in terms of the conclusions for interdict: *Quoad ultra*, in respect that it is impossible now to give effect to the conclusions for restoration, dismisses the petition and decerns, reserving to the pursuer all other claims competent to him in the premises, and to the defenders their answers as accords," &c.

"*Note.*—The defenders in this case are tenants under the Baroness Willoughby d'Eresby of what are known as the Stobhall salmon-fishings in the river Tay. These fishings are *ex adverso* of the lands belonging to the Baroness, which are situated on the left bank of the river, and in the parish of Cargill. The lands on the opposite or west side of the river are in the parish of Kinclaven, and form part of the estate of Ballathie, belonging to the pursuer General Richardson Robertson, who admittedly has right to the salmon-fishings *ex adverso* of his property. It appears that in or about the month of June 1878 the defenders commenced certain operations for the removal of boulders and stones from the *alveus* or bed of the river, at what is called the 'Pot Shot,' belonging to the Baroness, being a fishing station wrought from the Stobhall side of the river, and further down the river than the 'Ballathie Shot' belonging to the pursuer, and wrought from his side of the river. It is proved that the stones which formed the subject of these operations were, if not part of the solid rock, large boulders and fragments of rock which have formed part of the bed of the river past the memory of man. Two of them were pieces of rock described as being like lintels, and of the same formation as the rock at that part of the river. Andrew Foote (a defender) speaks of them as having been known for forty-five years. Others appear to have been boulders of crystalline limestone, three to five tons in weight, deposited in the bed of the river at some remote period.

"The operations in question were conducted from boats moored together in the river, so as to form a platform from which a diver was enabled to work at the stones to the effect of blowing them up by means of dynamite, after which the fragments were lifted with a crane or other mechanical power, and deposited near the defenders' side of the river, at a point (C on the plan) where they are said to interfere materially with the rod-fishing, which is by a usual arrangement carried on by the proprietors or their tenants on alternate days over the whole river, irrespective of sides, instead of being exercised by each on every day of the week *ex adverso* of his own side only.

"The defenders' operations had been begun without the consent of the pursuer, and they were carried on until interrupted by the interim interdict granted in this case on 29th June 1878. They are objected to as being an illegal interference with the *alveus* or bed of the river, and to some extent (particularly as regards the stone marked D on plan) as having been carried on upon the pursuer's side of the *medium filum* of the river.

"It is contended for the defenders—(1) That their operations are necessary for the proper working of the fishings occupied by them; (2) That the custom and practice of the river Tay sanctions such operations; and (3) That the pursuer's allegations of damage to his fishings, and as to the position of the stone D, are ill-founded in fact. The defenders do not allege that they had any express authority for such operations from the Baroness Willoughby d'Eresby, and they do not plead that her Ladyship ought to be called as an interested party.

"In the opinion of the Sheriff the pursuer has established a sufficient interest and title to object to the operations in question, and it is incumbent on the defenders to justify them. He thinks that the removal of these boulders and stones, and the deposit of the fragments at the point C, is clearly proved to be prejudicial to the pursuer's fishing rights. He also holds it proved that in the removal of the stone D the defenders' boats were moored on the Ballathie side of the centre of the river, and their operations were not confined to

their own property. But the Sheriff thinks that it is not incumbent on the pursuer in defending the existing state of possession against operations of a novel character, and involving material interference with the bed of the river, to prove that such operations extended into his part of the *solum*. If, in point of fact, the defenders' operations did involve such interference, and cannot be justified either by necessity or practice, the pursuer is, in the Sheriff's opinion, entitled to have them stopped. For it is material to observe that in this case the course followed by the pursuer has been very different from that adopted by the Earl of Wemyss in the case decided by Lord Anderson in 1852, which was referred to at the debate. In that case a fishing called the 'Upper Mary' had sustained considerable injury in consequence of a great flood. The fishing was below the Bridge of Perth, and the Earl of Wemyss, the proprietor of the fishings, raised an action of declarator in the Court of Session against the Tay Navigation Commissioners, concluding that he should be found entitled to repair and restore the fishings, with their stations and hauling-places, so as to enable him and his tenants to fish in the same way as they were in use to do before, and to deposit gravel or other materials in the channel of the river for the purpose of restoring the fishings to the same state and condition in which they had previously been. This was only asked subject to the condition and qualification that the operations should be 'executed in such manner as not to prejudice, injure, or interrupt the free navigation of the river Tay.'

"It was assumed that restoration was the measure of Lord Wemyss' right; and Lord Anderson in repelling the defenders' objections to the action was careful to distinguish between repairs rendered necessary by winter floods bringing down stones and gravel, and operations of a novel character upon the bed of the stream. These he referred to as deserving severe scrutiny. It was not contended that they could lawfully be undertaken by a riparian proprietor at his own hand. The position of the defenders in this case is in remarkable contrast with that of Lord Wemyss in seeking authority to restore the 'Upper Mary.' They have asked no authority for their operations, but have assumed the right of altering the bed of the river, and of deciding for themselves what operations are necessary or reasonable and proper in the fair prosecution of their fishings. They have claimed the right of breaking-up and taking out of the river that which has formed part of its bed from time immemorial, and of doing so, free from any supervision or control, by means of a fixed platform, and of artificial appliances of recent introduction. It appears to the Sheriff that the *onus* of justifying such a course of proceeding lies upon the defenders.

"The question therefore comes to be, Whether the defenders have succeeded in showing that the operations in question were either necessary or sanctioned by practice as being within the fair and reasonable exercise of a right of fishing *ex adverso* of one bank of the river. The Sheriff has carefully gone over the proof, and has found it impossible to avoid the conclusion that the defenders have failed in both points. The fishing at the Pot Shot appears to have been carried on from time immemorial notwithstanding the presence of these boulders and fragments of rock; and although the removal of them will undoubtedly tend to lengthen and improve that shot, and may even make it into a different station altogether, it is not possible to say that such removal is necessary for the proper working of the fishings of which the defenders hold a lease. The defenders are not entitled in working their fishings to alter the bed of the river to suit their own convenience or their views as to the best mode of working them. It was admitted that they were not entitled at their own hands to remove a piece of the rock, however inconveniently situated for their nets; and it appears to the Sheriff that the blowing up of boulders and fragments of rock fixed into the bed of the river, or which are known to have formed a part of the permanent bed of the river at that place, and are not alleged to have been brought down by any recent flood, is equally beyond a fishing proprietor's rights in the fair prosecution of his fishings. At least it is equally indefensible on the plea of necessity.

"With regard to the alleged custom and practice of the river Tay, it is sufficient to observe that the defenders have failed to prove any custom or practice which would at all justify that which has been here attempted. The removal of stones by the Tay Navigation Commissioners under their Act of Parliament is of no application, nor is any evidence by Mr Galletly or others as to removal of stones below the bridge, where the river bed is under the superintendence of these Commissioners. And as to such instances as those mentioned by Andrew Foote, even if none of them had been interdicted, they are quite insufficient to establish a practice or custom capable of binding the lieges as a part of the law of property. Some reasonable latitude will always be allowed in the *bona fide* clearing away of obstructions brought down by the floods of the previous winter. Roots of trees and stones may perhaps be allowed to lie for some years, in the hope that the floods of another winter may carry them away. It will not follow that they therefore become irremoveable by the proprietor interested in the fishings. So long as removal can be shown to be a mere repair for restoring the river to its ordinary condition, such removal may probably be allowable under proper conditions. But it is quite another thing for fishing tenants like the defenders to take upon themselves the removal, by such means as were used in the present case, of boulders which, so far as appears, have always formed a part of the bed of the river. It is vain to say that the removal of these will make no alteration in the flow of the river. The nature of the thing done must prove to anyone who has seen a river in different states of the water that a change more or less material must be produced. Besides, if fishing tenants are to be allowed to carry on such operations at their own hand in the case of ancient boulders and fragments of rock which have formed a part of the river bed for many years before they acquired their temporary right of fishing, and upon the plea that the river will not be materially altered, and that they will improve the fishings, where is the alleged right of alteration and improvement to end? On what principle could they be prevented removing a portion of the solid rock? The only safe principle as regards operations

attempted to be carried on without consultation with the proprietor of the other bank and of the other half of the fishings, is that they must be confined to operations conducted with the view of repairing damage. The case of the *Duke of Sutherland* v. *Ross*, April 15, 1878, H.L. (4 Rettie 765, *aff.* 5 Rettie 137) is no authority for what is defended in the present case. It was held that the artificial embankment erected by Sir Charles Ross was of the nature of a restoration, and had been erected merely to repair the breach which had occurred. The Sheriff knows no authority for that which was done in the present case; and it was admitted in answer to a question that none could be cited supporting the view of the defenders.

"On these grounds the Sheriff has held that the defenders' operations are an illegal and unwarrrantable interference with the bed of the river, and has granted interdict. It appears to him that, in any view, such alterations should not have been attempted in the summary and arbitrary manner adopted by the defenders.

"The conclusions for restoration are, however, clearly inoperative. Restoration is, in the circumstances impossible. The pursuer will have it in his power to compel the removal of the stones deposited at the point C, if they are not removed voluntarily. At least his claims, both as to that matter and any other remedy which he may be advised to seek, are reserved entire."

The defenders appealed, and argued—Their position was that of their landlord, and the nature of the fishing must be considered. They had not interfered with the rock, and only blasted away two boulders not attached to the rock in any sense. The evidence as to the use of nets showed the necessity for what had been done. The pursuer had not shown what injury had actually been done to him, and he must establish injury if he was to prevail. The practice had been to remove boulders from the bed of the Tay, and they had only been doing what had been done before, what was quite legal, and what was an operation in the ordinary sense falling within their rights.

Authorities—*West* v. *Aberdeen Harbour Commissioners*, Dec. 8, 1876, 4 R. 207 (and Lord President there); *Duke of Sutherland* v. *Sir C. Ross*, May 26, 1877, 4 R. 765 (and Lord Gifford there), and 5 R. (H L.) 137.

Replied for the respondent—He enjoyed a double capacity, for he was at once proprietor of the salmon-fishings and of the *alveus*. The *alveus* did not belong to the appellants beyond the *medium filum*. There was much injury done to them by this operation, for with a stream like the Tay a large and permanent change in the stream might be caused by such proceedings. This was not the case of removing small-sized stones, but two huge boulders were destroyed by the use of dynamite. There would be no limit to such proceedings unless this were stopped. The right to the bed of the river was in the riparian proprietors just as any other portion of their property, subject of course to certain obligations as regarded it.

Authorities—*Duke of Roxburghe* v. *Waldie's Trustees*, Feb. 18, 1879, 16 Scot. Law Rep. 364; *Orr Ewing* v. *Colquhoun's Trustees*, July 30, 1877, 4 Macph. (H. of L.) 116; *Bickett* v. *Morris*, May 20, 1864, 2 Macph. 1082, 4 Macph. (H. of L.) 44; *Jackson's Trustees* v. *Marshall*, July 4, 1872, 10 Macph. 913, L.R., 1 Sc. App. 47; *Mather* v. *M'Brair*, March 14, 1873, 11 Macph. 522 (and Lord Deas there). *Cf.* also *Stuart* v. *M'Barnet*, March 30, 1867, 5 Macph. 753, 6 Macph. (H. of L.) 123; *Lord Advocate* v. *Lord Lovat*, March 7, 1879, 16 Scot. Law Rep. 418; *Duke of Richmond* v. *Earl of Seafield*, Feb. 16, 1870, 8 Macph. 530 (Lord Justice-Clerk there).

At advising—

LORD ORMIDALE—Although this case is one of interest and importance, raising as it does some nice questions relating to the rights of riparian proprietors in a private river, it is not, in the view I take of it, attended with much difficulty.

The case originated in the Sheriff Court at Perth by a petition at the instance of General Richardson Robertson, the pursuer, praying that the defenders Messrs Andrew Foote & Company should be interdicted "from proceeding further with the removal from the *alveus* or bed of the river Tay opposite the fishing station called the Pot Shot, tenanted by them, of large stones and rocks, and from interfering in any way with said *alveus*." The petition also prays that the defenders should be ordained to restore the *alveus* to the condition in which it was at the time they commenced their operations.

The pursuer General Robertson is proprietor of the lands called Ballathie, on the right bank of the river Tay, directly opposite to the Pot Shot, which is on the left bank, and belongs in property to the Baroness d'Eresby. The pursuer is also proprietor of the salmon-fishings in the Tay *ex adverso* of his lands of Ballathie; and the Baroness d'Eresby is proprietor of the salmon-fishings *ex adverso* of her lands on the opposite side, and they are tenanted under her by the defenders. It is of importance that it should be kept in view that the parties are entitled to exercise the rights of fishing over and across the whole breadth of the river, although it is not and cannot be disputed that the *solum* or *alveus ad medium filum fluminis* belongs to them respectively, not however to use it as they please, but subject to the restrictions afterwards noticed.

It was in this position of matters that the defenders without the leave of the pursuer, either asked or given—without even notice to him or judicial authority—commenced and carried on the operations complained of. And it is admitted on the part of the defenders that they in or about June 1878 "commenced operations to remove stones from the *alveus* or bed of the river at the 'Pot Shot,' and that these operations were carried on by means of boats and men, and that a diving dress was used by the defenders Alexander Foote and Peter Foote, who went to the bottom of the river, where they bored two stones, which were blown up with dynamite." This admission might be of itself enough to justify the pursuer's applying for an interdict, but the proof shows that the defenders' operations were much more extensive—that upwards of twenty tons weight in boulders and stones had been removed by the defenders from the *alveus* of the river before the interdict was applied for. Not only so, but the defenders in place of their acknowledging that they were wrong, and engaging to abstain from such operations in future,

have endeavoured to justify their conduct, and disputed the right of the pursuer to interfere with them. The defenders have done so on various grounds—first, on the ground that their operations, although *in alveo*, were on their own side of the *medium filum fluminis;* second, on the ground that their operations were in no respect injurious to the pursuer; and third, on the ground that their operations were warranted by the practice or custom of the river Tay.

(1) In regard to the first of these grounds of defence, I may remark that it is not, I think, proved that the defenders' operations were wholly on their side of the *medium filum*. On the contrary, I rather think that it must be taken as proved that one at least of the large stones which the defenders removed by blasting was on the pursuer's side of the *medium filum*. But whether it was so or not is really of little or no consequence according to my understanding of the nature and effect of the principles laid down in the case of *Bickett* v. *Morris*, 2 Macph. 1082, and affirmed by the House of Lords, 1 Sc. App. 47—principles which were adopted and followed in the subsequent cases of *Jackson and Others* v. *Marshall*, 10 Macph. 913, and the *Duke of Roxburghe* v. *Darby Griffith's Trustees*, 16 Scot. Law Rep. 364. According to these principles I take it to be conclusively settled that although the *solum* or *alveus* of a private river belongs in severalty to the two riparian proprietors betwixt whose properties the river flows, the share of each extending *usque ad medium filum aquæ*, there is no such property in the water itself, except in so far as each proprietor has actually taken it for a legitimate use. The two riparian proprietors between whose estates the river flows—and it may be also the upper andl ower 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. From this it necessarily follows that a riparian proprietor is also entitled to insist that nothing shall be done even *in alveo*, whether on the one side or other of the *medium filum*, whereby the regular and natural flow of the water may be altered or materially affected. This principle was, I think, recognised and given effect to in all the cases I have referred to, and especially in the case of *Bickett* v. *Morris* as ultimately decided in the House of Lords. The Lord Chancellor makes this very clear when he states (p. 55)—"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 way as to interfere with the natural flow of the water." Lord Cranworth again observes (p. 59) that riparian proprietors are allowed to say—"We have a common interest in the unrestricted flow of the water, and we forbid any interference with it." "This," he adds, "is a plain intelligible rule easily understood, and easily followed, and from which I think your Lordships ought not to allow any departure." And Lord Westbury made statements to a similar effect; and in particular he observed (p. 61)—"When, however, it is said that the 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 with water might be used; but it must be used in such a manner as not to affect the interests of riparian proprietors in the stream." It is true that the case of *Bickett* v. *Morris*, and the other cases to which I have referred, relate to erections or obstructions *in alveo*, and not to the removal of boulders, stones, or other materials from the *alveus*. But I cannot see how that can make any difference in principle, as I assume at present that the effect on the stream is the same—that is to say, that the effect in the one case and in the other is to alter the natural and ordinary flow or current of the stream. Accordingly, it is impossible, I think, to read the opinions of the noble and learned Lords who took part in the judgment in *Bickett* v. *Morris* without seeing that they recognised no such distinction as that just noticed.

(2) The defenders, however, maintained that their operations were not only on their own side of the *medium filum*, but also that they were in no respect injurious to the pursuer. In regard to the facts upon which this plea is founded, the evidence, I must own, is not uniform, but to some extent conflicting. The broad fact, however, that upwards of twenty tons weight of boulders and stones have been removed from the *alveus* by the defenders, and that to enable them to do so they were obliged to resort to diving, boring, and blasting by dynamite is undoubted. Now, it is difficult to understand how such operations could take place without altering and interfering with the regular and natural flow of the river. It is only reasonable, I think, to infer that they did. But the matter is not left to inference merely. The pursuer's witnesses—and many of them are quite positive and distinct in their statements—say that the defenders' operations were and must have been injurious to the pursuer, particularly as regards his rod-fishing. Looking, then, at the whole proof, I cannot doubt that enough has been established to show that the operations complained of were of such a character as to warrant the interdict which the pursuer applied for and obtained. It was laid down in *Bickett* v. *Morris* that it is not necessary for a party complaining of operations *in alveo* to show that injury has been actually sustained, or even that it is imminent. The Lord Chancellor (p. 55) after noticing the opinions of the Judges in this Court on the point, to the effect that no proprietor is entitled to encroach upon the *alveus* of a running stream, and in particular the opinion of Lord Benholme, that no human being can with certainty know what the effect of an encroachment may be, and that when it is done it must be taken to be injurious whether damage can be qualified or not, and the opinion of Lord Neaves that the idea of compelling a party to define how an encroachment will operate upon him or what damage or injury it will produce could not be supported, goes on to say—"These views appear to me to be perfectly sound in principle, and to be supported by authority." Lord Cranworth expressed himself much to the same effect, and Lord Westbury (p. 62) concluded his observations in the case by saying—"It is wise, therefore, to lay down the general rule that even though immediate damage cannot be described, even though the actual loss cannot be predicted, yet if an obstruction be made to the current of the

stream, that obstruction is one which constitutes an injury 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 by 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." In the present case, therefore, I have no difficulty, having regard to the facts and the law, in holding that the defenders' plea of no injury cannot avail them.

(3) The only other plea which seems to be relied upon by the defenders was what they called the practice or custom of removing stones and boulders from the river Tay. But first, it does not appear to me that any such practice or custom has been shown to exist. That in some instances in the course of many years proprietors or their tenants on the banks of the Tay, as probably on the banks of other rivers, may have done what they had no right to do, is very likely; but that can never be held to justify what is *ex hypothesi* illegal. It may well be doubted whether any practice or custom, however general and well established, could do so. But be that as it may, I am very clear that no such general practice or custom has been established in the present case. So far from that being so, it is proved by the defenders themselves that in one instance at least the alleged practice was interdicted.

While, therefore, on the grounds I have now stated, and having regard to the authorities I have referred to, I am of opinion that the judgment of the Sheriff-Principal appealed against is right and ought to be affirmed, I am not to be understood as holding that a proprietor is not entitled *munire ripam*, or to remove boulders, stones, logs of wood, or other obstructions temporarily arising in the river by a flood or other circumstances, so as to restore the channel or *alveus* to its natural condition. Neither am I to be understood as holding that every trivial or immaterial interference with the *alveus*, which can do no harm to anyone, will be a sufficient warrant for an interdict. In regard to that part of the pursuer's petition which prays that the defenders should be ordained to restore matters to the condition in which they were before they commenced the operations complained of, I may observe that it was not insisted in, for the reason, as observed by the Sheriff-Principal, that restoration could not now be effected.

Lord Gifford—I agree with the result which has been reached by both your Lordships, and although the case is far from being free from difficulty, I think that the judgment of the Sheriff-Principal should in substance be adhered to. In the circumstances any other judgment might lead, not only to great inconvenience and embarrassment, but possibly to serious and permanent prejudice of the pursuer's right.

The chief difficulty which I feel in the case is rather a difficulty in point of fact than one in point of law. It appears to me that the law applicable to a case of this nature is sufficiently fixed by the decisions referred to at the bar, and in particular by the judgments both of this Court and of the House of Lords in the case of *Bickett* v. *Morris*. In a private river, although the property of the *alveus*—that is, of the *solum* of the *alveus*—is divided between the proprietors of the respective banks, each being proprietor of one-half of the *alveus* adjoining his own property and up to the *medium filum* of the stream, yet neither proprietor is entitled to appropriate by building or otherwise, or materially to interfere with, even his own half of the *alveus* without the consent of the opposite proprietor, and the opposite proprietor objecting to any proposed operations *in alveo* is not bound to show that damage will result to his property from these operations. It is enough if there be any risk or possibility of injury, even in exceptional or rare states of the river. This was the special point decided in *Bickett* v. *Morris*, and Lord Westbury in giving judgment states that it is 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." His Lordship observes—"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."

While, therefore, I hold it fixed law that there must be no material interference with any part of the *alveus* of a river, still if it could be clearly and indubitably shown that the operation of a proprietor in his own half of the *alveus* was so trifling in its nature or so evanescent in its endurance that it could not possibly have any permanent or appreciable effect on the current, and could not possibly injure in any way whatever the rights and interests of the opposite proprietor, I do not think that the judgment in *Bickett* v. *Morris*, or that any of the other judgments, would extend to such a case. I think there must always be at least the possibility of injury to the opposite proprietor, and if such injury is shown to be impossible (and the *onus* of showing this will always rest on the party who is doing anything *in alveo*), then as I read the cases the general right of a proprietor to use his own property would apply.

A very good example of this occurs in the present case, for I think it is shown that when the salmon-nets got entangled with a loose stone *in alveo* the practice on both sides of the river, and by all parties, was to pull such stone to the shore by means of the net or otherwise, so as to prevent a similar accident from occurring again. So long as this practice was confined to small stones no complaint has been made, and I think no such complaint could be made. The removal of such

stones could not possibly injure the *ex adverso* proprietor. In like manner in *Bickett* v. *Morris* the case was put of a proprietor for a lawful purpose fixing a stake in his own half of the *alveus* so as to facilitate his landing from a boat or for some similar use, and it seemed to be conceded that the *ex adverso* riparian proprietor could not reasonably object to this. This seems an equitable limitation of the rule, and if the appellants had proved in the case before us that the removal of the boulders, although of considerable size, could not possibly have affected the current or flow of the river, and could not by any possibility have injured the rights of the opposite proprietor, I think it would be very hard to prevent them from removing an obstruction to the draught of their own net upon their own side, such removal doing harm to nobody. The case would be really closely similar to the removal of a snag or tree root which possibly for a very long time had existed in the stream, the removal of which would not appreciably affect the current or injure in the slightest the opposite banks.

It is just here, however, that the appellants' case I think fails upon the facts. In the first place, the boulders removed were of very considerable size. Upwards of twenty tons have been taken out of the *alveus* of the river, and placed elsewhere, and although the abstraction of twenty tons of stone may not involve very large cubic contents, it is impossible to say that the effect may not be quite appreciable upon the current, or even serious, especially if loose sand or gravel is uncovered or left unprotected, which the current may then wash away. It is impossible to say where the alteration may end. Then the operation itself was a most formidable one. It was done by divers, by boring, blast, or shot-holes, and by blasting with dynamite, and it must have occasioned considerable disturbance in the old bed of the stream. In the next place, it is left doubtful whether one at least of the boulders removed was not on the opposite side of the *medium filum* from the appellants' bank, and thus not on the property of the appellants or their landlord at all; it was at least very near the centre of the river. And then lastly—and I cannot help attaching some importance to this—the operations complained of were performed at the appellants' own hand, without judicial authority, without notice to the respondents, and without giving the respondents any opportunity, by preliminary survey or otherwise, of ascertaining or estimating the probable consequences, or even of ascertaining exactly what has been done. After the boulders are blasted and their fragments removed, it is impossible with any precision to ascertain the original state of matters in the subaqueous *alveus* of the stream.

On the whole, therefore, I think the safe course is that adopted by the Sheriff, and that is to stop by interdict any further proceedings of the same nature. To refuse the interdict would be virtually to declare that the appellants may go on and do in future as they have done in the past, and I cannot tell to what lengths they might go. I think the very least that can be required is that the appellants must obtain precedent—judicial authority—before any operations are undertaken at all similar to those complained of. This is only fair to the opposite proprietor, and it will then be seen before any mischief is done whether there is any possibility of injury being suffered. Blasting rocks in *alveus* is an operation which cannot be undone. The blasted rocks cannot be replaced, and this is a sufficient reason for requiring judicial sanction, and for the previous hearing of both parties. I do not say that serious injury or any injury at all has been done by the removal of the boulders which has been already effected. That question, in the form of damages or possible reparation, is not before us, but I think I am entitled to say that such removal might very possibly cause injurious effects, and therefore should not be allowed, at least without very careful previous investigation.

Lord Justice-Clerk—This is a case of importance, not from its own intrinsic merits but from the principles involved in it. There is very little substance, in my opinion, in the interests alleged on either side; but I think it desirable that we should define with some precision the true rule of law which applies to the right of a riparian proprietor in the *solum* of the bed or channel of the stream which flows past his property. I do not think the juridical principle on which this rests is at all doubtful. The proprietor of the bank of a stream is the proprietor of the soil of the channel over which the stream passes, *a centro ad solum*, up to the middle line of the channel if he be proprietor only of one bank, and of the whole channel if he have both sides. It does not derogate from the absolute nature of the title that the enjoyment of the right is qualified and limited by collateral interests vested in others. There can be no doubt that the enjoyment of the right to the channel of a stream is limited by the common interests of other riparian proprietors in the water which passes over its surface. These interests may arise either from the natural uses which all riparian proprietors are entitled to make of the water of a running stream, or from the larger and more extensive right of salmon-fishing. But excepting that it is subject to these interests, the property in the channel is the same as any other property, or the proprietor may so deal with it.

It is quite another matter what operations will and what will not infer an interference with the interests of other riparian proprietors; but if there be no such interests interfered with, the right may be enjoyed as an ordinary right of property. It would have been hardly necessary to express the nature of this right were it not that in the argument some expressions falling from the Court and the House of Lords have been construed to imply that operations on the channel of a river are beyond the title of a riparian proprietor, apart altogether from present or possible interference with the collateral rights of others. I think this a misapprehension of the decisions in question, and that it would lead to very erroneous results. These cases all proceeded on the principles to which I have referred. In the case of the *Duke of Roxburghe* we held that one riparian proprietor was not entitled to dam-up and restrain the current of the water in a question with the owner of the opposite bank having a joint right of salmon-fishing. In the case of *Jackson* v. *Marshall* we held that a proprietor could not protect his own property by embank-

ment if his doing so would put the banks of an adjacent owner in peril of injury. In *Bickett* v. *Morris* it was held that the channel could not be used for building purposes, although to a small extent, in a question with an immediately lower proprietor.

But all these cases simply show that if the operation on the channel of the stream be material and capable of producing an alteration on the interests of other riparian proprietors, it is not necessary to qualify or establish actual injury. When, however, these cases are carried further, to the effect that apart from injury to others such operations are beyond the title of the riparian proprietor, we are led into legal results contrary to well-established principles. It would follow that when a proprietor is owner of both sides of the stream for a considerable extent he can neither add to or take from or alter the *alveus* of the stream within his own land. But this is manifestly at variance with everyday practice. A man may embank his own land to protect it against floods if the only land affected is his own; and a lower proprietor whose property lay two miles down could not be heard to interfere with him. A similar state of matters exists as to making reservoirs and so forth. Nay more, a proprietor in these circumstances may divert the course of a stream within his own land subject to the same restriction. Now, if it were true that it is beyond the title of a riparian proprietor to interfere with the *alveus* of a stream, this could not be the case.

It may be, I think, laid down as a general principle that the ownership of the *alveus* is in the riparian proprietors, subject only to one limitation, and that is the interest of other proprietors who may be affected by anything done in or to the channel of the stream. Of course the probability of injury to the interests of others is very largely increased where the proprietor who undertakes operations *in alveo* only owns one bank of the river, or where upper owners enjoy further down stream and beyond the marches of their own lands such a right as salmon-fishing only.

Now, as to the present question with reference to these two boulders, it was quite legitimate to remove them in order to give proper facilities for fishing; that is clear, provided no one else was injured. It appears, however, that these boulders formed an old part of the *alveus*, and that truly their removal merely had for its object the prevention of the net catching as it was being drawn, to the loss of the fishermen. Now, such a removal has been effected without doing any harm, and therefore we may assume that it is possible, and especially in the case of smaller and more recent boulders quite legal. The case then is much narrowed. But in the present instance the exercise of the right is not one of an ordinary but of an extraordinary character. While it is true that the Tay is daily, almost hourly, changing its bed—while these boulders might at one time have been projecting as they were to the extent of three feet or so, and at another time be flush with the bed of the stream—while it is also true that other boulders may come down in place of those removed—the question still remains, whether your Lordships would be justified in permitting such operations as have here taken place? If so, why is there to be any prohibition as to the blasting of solid rock or the removal of waterfalls? Are they also to be subjected to the action of dynamite? I do not think we can adopt such a view. This case appears to me to go beyond the bare enjoyment of an ordinary right, and to partake of the nature of an extraordinary operation. I am accordingly in favour of adhering.

The Court adhered.

Counsel for Pursuer (Respondent)—Balfour—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders (Appellants)—Trayner—Johnston. Agents—Begg & Murray, Solicitors.

Saturday, July 19.

FIRST DIVISION.

[Lord Young, Ordinary.

CITY OF GLASGOW BANK LIQUIDATION — (*CUNINGHAM'S CASE*) — CHARLES ARTHUR CUNINGHAM AND OTHERS *v.* ROGER MONTGOMERIE AND ANOTHER (CUNINGHAM'S TRUSTEES) AND THE LIQUIDATORS.

Public Company—Winding-up—Relief—Liability where Trustees cannot Pay full Amount of Calls—Marriage-Contract—Power of Investment—Where Trustees empowered to Invest in "Bank Stock."

A Scotch marriage-contract empowered the trustees to invest the trust funds "on such heritable security or in such public and Government stock of Great Britain, or in bank stock, railway debentures, or in such other security as they may consider eligible and expedient." They invested part of the trust funds in a joint-stock bank of unlimited liability which was registered but not formed under the Companies Act of 1862. The investment was made at the request of the spouses. The bank failed, and the trustees proposed to apply the whole trust-estate in payment of the calls which were made upon them. What they were able to pay out of their own means was much less than what could be got out of the trust-estate. In an action by the spouses against the trustees and the liquidators to have it declared that the trustees were not entitled so to apply the trust-estate, either at all or at all events to a greater extent than they themselves had been able to pay the calls out of their own means —*held* (1) that as the term "bank stock" comprehended the stock of such a bank as the one in question, the investment was not *ultra vires* of the trustees; and (2) that the trustees, as the mandatories of the trusters, were entitled to be relieved by their mandants entirely and immediately of whatever liability they had incurred in the execution of the mandate, without reference to their own actual payments or power to pay.

Opinions (*per* Lord Deas, Lord Shand, and Lord Young) that in the circumstances stated above the liquidators would have been entitled to insist upon the trustees making their right of relief available to them.