and site have been approved of by the said Court: And it is further declared, that all the residue of the money received from the said railway company, and all interest thereon, and the rest of the property of the said hospital, is applicable to the enlargement and maintenance of the said charity as declared and established by the charters dated respectively the 12th November 1567 and 26th May 1587 in the said proceedings mentioned, according to a scheme to be settled for that purpose (including therein the rebuilding of the hospital if the same shall be deemed necessary): And it is further ordered, that it be referred to the said Court of Session to settle and approve of such scheme accordingly, and to inquire and ascertain of what the property of the said hospital consists, and in what manner the money received from the said railway company has been invested by the said defenders (respondents), and when such investments were made, and what sums have been received for interest thereon, and by whom and how such sums have been applied: And it is also further declared, that the expenses properly incurred by the pursuers and defenders in this cause in the Court below, and the costs properly incurred by the said appellants and respondents in this appeal, ought to be paid out of the funds of the charity; and it is therefore further ordered, that the expenses so properly incurred by the said pursuers and defenders in this cause in the Court below, and the costs so properly incurred by the said appellants and respondents in the said appeal, be duly taxed, and the amount of such taxed costs in the said cause in the Court below and the amount certified by the Clerk of the Parliaments of such costs of the said appeal, be paid out of such parts of the funds of the said charity as the said Court of Session shall deem most fit to be applied for that purpose: And it is also further ordered, that the cause be, and is hereby, remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with these declarations and directions, and this judgment."

Agents for Clephane and Others, Deans and Stein, Westminster; Wotherspoon and Mack, S.S.C.—*For Magistrates of Edinburgh*, Maitland and Graham, Westminster; Graham and Johnstone, W.S.—*For Forrester*, Loch and Maclaurin, Westminster; J. Webster, S.S.C.

MARCH 3, 1864.

HUGH TENNENT, *Appellant*, *v.* THE EARL OF GLASGOW, *Respondent.*

Process—Advocation—Sheriff Court—Cause exceeding £25—16 and 17 Vict. cap. 80—*When a cause is advocated from the Sheriff Court as exceeding the value of £25, the value is, for this purpose, to be computed by taking the amount which would have been recovered*, plus *interest, if the interlocutor of the Sheriff which is advocated had found for the pursuer.*

Reparation—Culpa—Negligence—Fence—Extraordinary fall of rain—Damnum fatale—*G. built a stone wall in lieu of a thorn fence bounding his property. A stream which ran through such property having become swollen with rain, at a point which was one third of a mile distant from the wall, burst its banks, left the channel, and flowed down a declivity to the wall, and there accumulating burst the wall, and crossing the turnpike road, flooded the grounds of T. on the other side. Before the wall was built, surplus water found a vent through the hedge. The Court found that the damage was caused solely by an unprecedented fall of rain, and not by G.'s fault.*

HELD (affirming judgment), *That the damage was a* damnum fatale, *and that G. was not liable.*[1]

The action commenced with a summons, dated 8th June 1860, in the Sheriff Court of Ayrshire, which concluded for payment of £22 6*s.* 6*d.* for damages caused by a wall negligently built, and so causing floodage.

After condescendence and answers the record was closed, and proof was led. On 9th August 1861 the Sheriff substitute pronounced an interlocutor, containing various findings, concluding thus:—"Finds, therefore, the defender liable to the pursuer in the sum sued for, and in the lawful interest thereon, but commencing from the date of citation to the action; also with expenses." This interlocutor was adhered to by the Sheriff principal on 4th October 1861.

The cause was then advocated to the Court of Session, and after argument the following interlocutor was pronounced:—"*12th December* 1862.—The Lords," etc.: "Advocate the cause, recall the interlocutor of the Sheriff substitute and Sheriff principal complained of: Find, that it

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[1] See previous report 1 Macph. 133; 35 Sc. Jur. 78. S. C. 1 Macph. H. L. 22; 36 Sc. Jur. 400.

is proved as matter of fact: 1st, That in the month of June 1858, damage was done to the pursuer's property by the flooding thereof by water, which had accumulated behind a fence wall erected by the defender in 1856, on his property along the public road on the opposite side from the pursuer's property, and which water suddenly escaped in a great body through a gap formed by the fall of part of the said wall, and rushed across the public road, and into the property of the pursuer; *2d*, That the said fall of a part of the wall was caused, not by any defect in the structure of the wall at that part, but by the great pressure of an extraordinary quantity of water which had unexpectedly accumulated behind it; *3d*, That the said accumulation of water had taken place in the course of about an hour, or less than an hour, preceding the giving way of the wall, during which time there was an unprecedented fall of rain in that particular locality; *4th*, That the water which so accumulated had escaped from a burn which had its regular course through the defender's lands to a conduit through which it passed under the defender's wall, and under the parish road at a point about 590 yards distant from and on a higher level than the point at which the wall gave way; *5th*, That at a point about 90 yards further up the stream than the said conduit there is a bend or elbow in the channel of the said burn, and on the occasion in question the burn burst its banks at said bend, and a great body of the water, instead of turning to the left and flowing by the regular channel of the burn to the conduit, directed its course in a straight line from the bend down a steep declivity to the point at which the wall eventually gave way, and there accumulated and rose rapidly till it attained a height of about four feet, when, by the falling of the said portion of the wall, it got vent and rushed in a body across the public (not parish) road, and to the property of the pursuer; *6th*, That another portion of the water of the burn descended by the ordinary channel to the said conduit, by which the water of the burn is conducted under the defender's wall and the parish road; *7th*, That the said conduit had been made before the defender built his wall in 1856, and at that time the fence, for which the said wall has been substituted, consisted of a thorn hedge, and it sometimes happened on occasions of heavy rain, and especially when the conduit was more or less choked with rubbish, that the burn overflowed its banks at the conduit, and on these occasions water that did not get through the conduit passed through the hedge to the parish road, and so escaped; *8th*, That when the wall was erected the conduit was not enlarged, and no apertures were left in the wall or other provision made for the escape, as formerly, to the parish road of any water which could not get through the conduit, and thus such water was left to seek its way along the side of the wall towards the lower ground; *9th*, That the bursting of the burn at the bend, as aforesaid, was not caused by any regorging or damming up of the water in the lower part of the stream, or by any operation of the defender, but was caused by an extraordinary quantity of water being thrown into the upper part of the stream by a sudden and unprecedented fall of rain: Find, that it is not proved, that on the occasion in question the conduit was choked, or that any appreciable quantity of water overflowed at the conduit, or that the accumulation of water behind the wall was caused or was in anyway material or appreciable degree increased by want of sufficient means of escape at the conduit, or was attributable to any defect in the construction of the wall, or to any operation of the defender, or to any fault or neglect on his part: Find, in point of law, that the defender is not liable for the damage caused to the pursuer by the extraordinary occurrence referred to: Therefore assoilzie the defender from the whole conclusions of the libel, and decern: Find the pursuer liable to the defender in the expenses incurred both in the inferior Court and this Court: Allow an account," etc.

The appellant in his *printed case* submitted the following reasons for reversing:—1. Because the Court of Session had no jurisdiction in the cause. 2. Because the interlocutors of the Sheriff, according to the true intent and meaning of the Sheriff Court Act, were final and conclusive, and the Court of Session had no power to reverse or alter the same. 3. Because the interlocutor of the Court of Session does not specify the facts, and is not conclusive as to the facts, nor does it express how far the judgment proceeds on matter of fact, or on matter of law, or what is the point of law which the Court meant to decide. 4. Because the respondent is liable to the appellant for the damage and injury so occasioned to the lands of the appellant, inasmuch as the same were occasioned by the respondent having substituted a stone wall without any openings or means being provided for the escape of the water in cases of flood, instead of the old thorn hedge or fence, through which, whilst it existed, the water could and would have escaped and flowed gradually and without doing damage to the appellant's grounds, and it was the duty of the respondent when he did away with the said hedge or fence and substituted the stone wall, to have provided means as effective as those previously afforded by the hedge or fence for the avoidance and prevention, in cases of flood, of such damage as was caused to the appellant on the occasion in question. 5. Because, on the facts of the case, the interlocutor of the Court of Session is erroneous, and the interlocutors of the Sheriff are well founded, in point of law.

The respondent in his *printed case* supported the judgment for the following reasons:—1. Because the case of the appellant, as averred on record, is entirely disproved. 2. Because

the damage alleged to have been sustained by the appellant was not caused by any fault or negligence of the respondent.

Anderson Q.C., and *Honeyman*, for the appellant.—1. The decision of the Sheriff Court was final, and could not be advocated to the Court of Session, inasmuch as the cause did not exceed the value of £25: 16 and 17 Vict. cap. 80. This objection had not been taken in the Court below, nevertheless it was now competent to take it, for the objection to the jurisdiction could not be waived. No consent of the parties could give jurisdiction where, according to Statute, none existed—*Commissioners of Forfeited Estates* v. *Drummond*, Robertson, Ap. 290. This House has dismissed an appeal on a similar ground, though the objection had not been taken in the Court below; and the House has itself raised the objection—*North British Railway Company* v. *Wauchope*, 4 Macq. 352; *ante*, p. 1121.

[LORD CHANCELLOR.—How do you construe the words of the Statute, "not exceeding the value of £25;" do you add the costs to make up the amount?]

The way to compute it was to look to the conclusions of the summons as was done in *Hopkirk* v. *Wilson*, 18 D. 299. The conclusion was only for £22 6*s*., and interest from 21st June 1858, but the interest up to the date of the summons would not bring the total up to £25.

[LORD CHANCELLOR.—But if you consented to the advocation, how can you be allowed now to turn round and take advantage of the objection?]

The respondent must be taken to have known the law, and that his advocation was at his own peril. In similar cases in England, where a Statute gave jurisdiction to the Sheriff to try a cause under £20, it was held, that the consent of parties made no difference and did not give jurisdiction—*Lismore* v. *Beadle*, 1 Dowl. N. S. 566; *Smith* v. *Brown*, 5 Dowl. 736.

[LORD CHANCELLOR.—We will hear the other side on this preliminary objection, before going into the merits.]

Sir H. Cairns Q.C., and *Mure*, for the respondent.—The Court of Session had jurisdiction to entertain the advocation. It was well established in Scotland, that litigants could prorogate the jurisdiction—Ersk. Prin. p. 29. That had been done here. There was nothing to prevent the waiver of such an objection; there was no rule of public policy to prevent it—*Dudgeon* v. *Thomson*, 1 Macq. App. 714; *ante*, p. 403; *Craig* v. *Duffus*, 6 Bell's App. 308. The words of the Statute did not declare the Court incompetent, nor restrict its jurisdiction, but merely enabled one party to object; but when both parties consented, the jurisdiction was admitted. But even supposing there could be no prorogating of jurisdiction, there was jurisdiction without it, for the cause did exceed the value of £25. The action was brought to recover £22 6*s*. 6*d*., *plus* interest, from June 1858 till the Sheriff made his interlocutor, and the interest that has since accrued raises the value above £25. The interest is calculated not merely up to the time of action brought, but up to the time when decree was made for payment, and this interest was part of the sum sued for—*Mitchell* v. *Murray*, 17 D. 682.

Anderson replied.—The case of *Mitchell* v. *Murray* was not well decided; the Judges in the minority of the Court were right on that occasion.

[LORD CHANCELLOR.—We think the rule laid down in *Mitchell* v. *Murray* ought not now to be departed from, and therefore we overrule the objection, that the cause could not be advocated to the Court of Session.]

Then the interlocutor of the Court of Session, reviewing that of the Sheriff, does not comply with the Statute 6 Geo. IV. c. 120, § 40, for it does not clearly separate the matter of fact from the matter of law, and state on what ground it proceeds. It says there was no fault of the defender, and yet it does not say whether there was any legal obligation on the defender's part to provide against such damage. Lastly, the facts, as proved, shew, that the damage was caused by the negligence of the respondent. The case resembles that of *Kerr* v. *Lord Orkney*, 20 D. 299. The respondent had been using his property so as to cause damage to his neighbour, which was contrary to the maxim, *Sic utere tuo ut alienum non lædas*. The interlocutor attributed the origin of the damage to an unprecedented fall of rain. That is a loose phrase. It could not mean, that at no prior time had such a fall of rain ever occurred. It had been said by Baron Bramwell, in *Ruck* v. *Williams*, 3 H. & N. 308, that a flood which occurred once in a hundred years could not be held extraordinary. In *Great Western Canada Railway Company* v. *Fawcett*, 1 Moore, P.C., N.S. 101, it is stated, that a railway embankment fell owing to an extraordinary rainfall; but in that case provision had been made for such a flow of water as might be reasonably expected. But in the present case no such provision had been made at all, for the culvert was inadequate when the wall was built, in lieu of a hedge, and was not enlarged as it ought then to have been. The whole findings of the interlocutor, taken together, did not alter the complexion of the case, nor displace the *primâ facie* liability of the respondent.

[LORD CHANCELLOR.—Surely if you take the affirmative findings without the negative, you are bound hand and foot by the interlocutor of the Court of Session.]

Even if the finding of no neglect in the respondent be taken as conclusive, it did not follow, that the respondent was not liable for the damage done by reason of his ownership of the

property. Thus, in the case of the owner of a monkey which had bitten a person, the owner was held liable, though no negligence on his part was alleged—*May* v. *Burdett*, 9 Q. B. 101. That case shewed that, if the respondent caused the injury, his negligence was immaterial. [LORD CHANCELLOR.—If the water that flowed had been like the monkey, it would have caused the mischief, but the interlocutor finds, that it did not cause the mischief.]

There are other illustrations of the rule, that liability may result, though no negligence could be attributed to the owner—*Jackson* v. *Smithson*, 15 M. & W. 563; *Vaughan* v. *Taff Vale Railway Company*, 5 H. & N. 679.

Sir H. Cairns Q.C., and *Mure*, were not further called upon.

LORD CHANCELLOR WESTBURY.—My Lords, the points in this case are, I think, too clear to leave any doubt upon your Lordships' minds, and therefore I apprehend, that your Lordships will feel it your duty not to call upon the respondents. This appeal raised for your consideration two points or questions. One was, that the subject matter in controversy was not sufficient to admit of an appeal to the Court of Session from the decision of the Sheriff Court. I think your Lordships have already given your opinion, that, in conformity with general practice, as it has been now fixed by the decisions of the Scotch tribunals, the value of the cause for the purpose of determining the right of appeal must be assessed, or taken at the date of the interlocutor from which the advocation is drawn, and if the amount then in controversy, exclusive of expenses, be equal to, or exceed, the sum of £25, it may be properly made the subject of an advocation.

Now, in this case, it is perfectly clear, that, at the date of the interlocutor, if the judgment had been given in favour of the present appellant for the sum in controversy, with interest thereon, according to the conclusion of the summons, that sum would have exceeded £25. That therefore determines or assesses the value of the cause, and renders the interlocutor liable to advocation.

The other point in this case is one on which I regret very much to see, that the parties have thought fit to bring an appeal before your Lordships. It is undoubtedly true, that we have a former instance of this extraordinary determination in litigation. I mean the instance in which, I think, actions were brought for the loss of a sheep which was killed by a dog, (*Fleeming* v. *Orr*, *ante*, p. 496: 2 Macq. Ap. 14,) the value of the sheep being the sum of £1 10*s.*; and after the cause had gone through various stages in Scotland, it was finally brought to your Lordships' House, and the amounts spent in litigation about that sheep must have exceeded a great many hundreds of pounds. In this case, the sum in controversy is about £22 6*s.* 6*d.*, and it arises under circumstances which are perfectly clear, and upon which, I think, no question of law can by possibility arise.

I may mention, that, in the Judicature Act of Scotland, a very wise provision has been inserted, that in cases of this description of advocation from the Sheriff Court, it shall be the duty of the Court of Session to specify in their interlocutor the several facts material to the case which they find to be established by the proof, and to express how far their judgment proceeds upon the matter of fact as distinguished from matter of law, and the several points of law which they mean to decide. Then the judgment thus pronounced may be appealed to your Lordships' House, in so far only as the same depends upon or is affected by matter of law.

I think it unnecessary for you to take anything more than the affirmative findings in this interlocutor; and upon those affirmative findings I think your Lordships will agree with me, that it is perfectly clear, that if any question of law arises, it must be found in favour of the respondent.

The facts of the case are these:—the noble defender is the owner of the piece of land of considerable extent, which is bounded upon one side by a public road, and upon another side by a parish road, the parish road entering at right angles, or nearly so, into the public road. The land slopes with a considerable declivity towards the public road, and at some distance upwards from the public road. Along the slope of land runs an ancient burn or brook, which finds its way not quite in a straight course, but making an elbow in the course of its channel along the slope of the defender's land, and then enters the parish road. Previously to the erection of the wall of the defender, both the parish road and also the public road were fenced off, and the land was bounded by a thorn hedge. But from the point where the burn entered the parish road, it was conducted by a conduit beneath the parish road. The defender thought proper to enclose his land, as he had a perfect right to do, by a wall running along the parish road, and also along the public road—the wall, of course, having an opening to admit of the burn passing under it into the conduit.

It might have been a very material thing in this case, if the injury, or the wrong, as I should rather call it, sustained by the appellant could have been shewn to have been caused by a state of circumstances directly occasioned by the building of the wall by the defender over the conduit and along the parish road, because it is clear, that the natural course of the stream was down the parish road, and that the conduit provided a means of carrying the water beneath the parish road. If, by reason of the taking away the thorn hedge by the said parish road, and the substituting a wall for it without proper apertures, it had been shewn, that the flood which had

occurred had been pent by means of that substituted wall, and consequently the water kept in and precipitated down the declivity against the wall that bounded the public road, the state of things before your Lordships might have admitted of a different result. But, on the contrary, it is found distinctly in this case, and necessarily results from the facts stated in the interlocutor, that the portion of the wall bounding the public road which gave way, and furnished a vent to the water by which it invaded the appellant's grounds and house, so gave way under the pressure of water which had accumulated—not water which overflowed at the conduit—not an accumulation which was in any manner occasioned by the erection of the wall bounding the parish road —but an accumulation arising from another circumstance, namely, that the descent of the water down the channel of the brook to the point where the channel makes a natural elbow or bend, was so great in consequence of a fall of rain found to have been unprecedented, that the volume or rush of water at that spot overpowered the banks of the burn, and consequently a great volume of water descended directly down to the wall bounding the public road, escaping from the point of that elbow where the rush of water had burst the natural banks. This occurrence, therefore, was a natural occurrence, and not in the smallest degree occasioned or augmented by reason of anything which had been done or had been omitted to be done by the defender. It was a thing of which, so far as the facts found warrant an inference of the kind, there had been no example before, nor was it likely, from anything that had previously occurred, that any such occurrence could have been anticipated.

It is further material to observe with reference to the argument, that it is not found in this interlocutor, nor is it a conclusion to be drawn from any of the findings in this interlocutor, that the water had ever been in the habit of descending down the hill from the channel of the burn, and finding its escape into the public road through the thorn hedge. No such fact is established, and that is a material circumstance; because if it had been a common occurrence, either a daily occurrence, or an occurrence happening at intervals, that water escaped from the burn, descended directly down the land, and found an exit through the hedge into the public road, the possibility of such an occurrence might possibly have thrown upon the defender the obligation of guarding against that contingency. But, as I have observed, no such thing is found. And, on the contrary, that it might have been reasonably expected, is a conclusion which is altogether precluded and prevented from being implied by the facts, that are distinctly found, namely, that the bursting of the burn at the elbow was the result of a great pressure of an extraordinary quantity of water, which had unexpectedly accumulated by reason of an unprecedented fall of rain. It is plain, therefore, from these facts, that nothing was done by the defender which led, directly or indirectly, to the occurrence, nor was anything omitted to be done by the defender, that could properly, or by possibility, be denominated or described as the cause of the occurrence.

This case differs very much from those which have been cited and relied upon at the bar. If anything be done by an individual which interferes with natural occurrences, such as, for example, in *Lord Orkney's case*, throwing a dam across the course of a stream, it is undoubtedly the duty of that individual so to construct the work as to provide, in an efficient manner, not only against usual occurrences, and the ordinary state of things, but also to provide against things which are unusual and extraordinary; and therefore the decision of the Court in the *Earl of Orkney's case*, where a dam gave way, was properly referable to that circumstance. So also, in the case cited as having been decided by the Privy Council—the case of the *Great Western Railway Company of Canada* v. *Fawcett*, 1 Moore, N. S. 101. There, it was clear, that the railway company intended to provide against an occurrence which was of constant repetition, by making a ditch along the side of an embankment; but then it was found, that that ditch was constructed in an insufficient and improper manner. Therefore it was plain, that the obligation which they had admitted by constructing the embankment was an obligation, that was imperfectly and insufficiently discharged. But there was nothing which the defender was bound to guard against in the building of the wall along the public road. It is not found, as I have already observed, that any water had been in the habit of escaping in that way, nor was the wall erected for the purpose of interfering with anything like that which has been called at the bar "the course of nature." The wall is found to have been erected in a substantial manner, to have been a good structure, and of the proper kind of construction. There is, therefore, nothing at all found here, in the facts stated in the interlocutor, which could be conceived as amounting to an obligation upon the defender to provide for anything like the occurrence which took place.

Under these circumstances, what has occurred is one of those things which do not involve any legal liability, what is denominated in the law of Scotland *damnum fatale*—occurrences and circumstances which no human foresight can provide against, and of which human prudence is not bound to recognize the possibility; and which, when they do occur, therefore, are calamities that do not involve the obligation of paying for the consequences that may result from them.

Under these circumstances, I think you will agree with me in the conclusion, that this appeal ought to be dismissed, and that it must be dismissed with costs.

LORD CRANWORTH.—My Lords, I think if your Lordships should come to any other conclusion than that which my noble and learned friend has indicated, you would be laying down doctrines which would be quite startling to mankind. For the proposition contended for by the appellant is, that this nobleman having built a wall where no water had ever been in the habit of flowing, and which was a distance of a third of a mile, or rather more than a third of a mile, I think, from a stream running parallel to the wall which he erected, is legally responsible; because after an unprecedented fall of water, which, even if the word be taken in a figurative sense, must mean a fall of water such as no living memory could find a parallel to, had happened, the river burst the natural protection of its banks, and that naturally shut it in, and the water escaped from it in a direction in which it had never escaped before, came down to this wall, and knocked it down, whereby the injury in question was occasioned.

These are the facts which appear in the special findings. Now, if a person is to be responsible for damage so occasioned, no man can know what he can do with safety. Suppose that, instead of building a wall, the noble defender had built a row of houses, of course the increase of water might have been so enormous as to have knocked down a house, in that case would he be responsible for that? Because he had built a house in a place where there never was water flowing before, but where, by the act of God, or what is called *damnum fatale*, water flows at a particular time, is he to be responsible for the consequences which happen? Now, that damage in this case did arise entirely from this bursting of water, and not from any defect in the foundation of the wall, whereby the water had sometimes escaped previously by the side of the conduit, is perfectly plain; because the finding is, "that the burn burst its banks at said bend, and that a great body of the water, instead of flowing to the left, and flowing by the regular channel of the burn to the conduit, directed its course in a straight line from the bend down a steep declivity," (that is, at right angles, or nearly at right angles, to its natural course,) "to the point at which the wall eventually gave way, and there accumulated and rose rapidly." Now, my Lords, observe what follows, "till it" (that is, the water which had so flowed down the bend) "attained a height of about four feet, when, by the falling of the said portions of the wall, it" (that is, the water which had accumulated from the bursting of the bank) "got vent and rushed in a body across the public (not parish) road,"—then it goes on to say that it occasioned injury to the pursuer.

It appears to me to be perfectly clear, that this was a contingency against which no human foresight could provide, and against which no person was bound to provide. Therefore, I quite concur with my noble and learned friend in thinking, that the appeal ought to be dismissed, and dismissed, of course, with costs.

With regard to the point of form, I can only add, that I think it is quite clear, that with regard to a question of that sort, as to whether it was the most accurate way of determining the value of the cause to say, that it means what was the value at the time when the appeal or the advocation takes place, it would be improper for your Lordships to enter into such a question. That point was a matter of doubt, and it was very necessary, that a rule should be laid down upon it. A rule has been laid down upon it. A rule has been laid down which seems to be a very reasonable rule, perhaps it is the best; but whether it is the best or not, it is a rule upon the point. Under these circumstances, I think your Lordships would set a very bad precedent, if you hesitated in every such case in adhering to it.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friends, that the interlocutor appealed from ought to be affirmed. I think that the pursuer was not entitled to recover against the defender without shewing some negligence or default upon his part which occasioned the injury. It is not at all like the case of *May* v. *Burdett*, with regard to the monkey, because there the monkey was described as a mischievous and ferocious animal—an animal which was dangerous to keep, and could be kept only upon condition of its doing no injury to any person. Now, in the present case, the erection of the wall was a necessary and a lawful act; and, therefore, it was absolutely necessary for the pursuer to shew, in consequence, some negligence either in the construction of the wall or in some other particular, whereby the wall had burst, and the injury had happened to him. The interlocutor expressly finds as a fact, that the pursuer failed to prove those circumstances which would render the defender liable; for I cannot agree with Mr. Anderson, that the portion of the 9th paragraph in the interlocutor is not a finding in point of fact. It is found expressly, that the pursuer failed to prove, that, on the occasion in question, the conduit was choked, or that any appreciable quantity of water overflowed at the conduit, or that the accumulation of water behind the wall was caused, or was in any material or appreciable degree increased by the want of sufficient means of escape at the conduit, or was attributable to any defect in the construction of the wall, or to any operation of the defender, or to any fault or neglect on his part. It is necessary for the pursuer, in order to establish his case, to shew, that there was negligence in one or other of these respects, and he failed in any particular.

This case is not at all like the *case of Lord Orkney*—that is, the case with respect to the dam; because, as I have already intimated, the stream, before the erection of the dam, flowed harmlessly to the pursuer's wall. Lord Orkney erected a dam, by which he obstructed the course of the water. He was bound, therefore, under these circumstances, interfering with the stream, and

with another person's right over the stream, to provide against every contingency. And although it was an extraordinary flood in that case which occasioned the bursting of the dam, it was one which he ought to have provided against. He ought to have made the dam capable of resisting any force which might be directed against it.

That being so, the question then is, whether the finding in point of law is correct, that there being no proof whatever of any negligence upon the part of the defender, he is not liable to the pursuer for the injury which has happened? I apprehend, that there can be no doubt at all, that this was an extraordinary and unprecedented flood, as it is called; nor that it was one which it is impossible for any person merely building a wall to enclose his grounds to provide against, nor which it was necessary for him to provide against.

Under these circumstances, therefore, I agree entirely with my noble and learned friends that the interlocutor appealed from ought to be affirmed.

Interlocutors affirmed, with costs.

Appellant's Agents, Campbell and Smith, S.S.C.; Uptons, Johnson, and Upton, 20, Austin Friars, London. — *Respondent's Agents*, Tods, Murray, and Jamieson, W.S.; Maitland and Graham, Westminster.

APRIL 6, 1864.

MRS. ELEANOR SUTOR or PITT, *Appellant*, *v.* THE HON. HORACE PITT, *Respondent.*

Husband and Wife—Divorce—Jurisdiction—Domicile—*P., a younger son of an English peer, and born in England, married there Mrs. P. in* 1845. *Being greatly in debt in* 1854, *and leaving his wife in England, where she ever since remained, he went to Scotland to avoid his creditors, and joined a friend in shooting quarters there. In* 1858 *he took a six years' shooting lease of a place in Scotland, and remained there till* 1860. *From* 1854 *to* 1860, *he resided continuously in Scotland, making a flying visit occasionally to England, to see his friends and Mrs. P., with whom he corresponded all that time. In* 1860 *he raised, in the Court of Session, an action of divorce against Mrs. P. on the ground of her adultery in England in* 1858.

HELD (reversing judgment), *That P. had not acquired a domicile in Scotland, his main object in going there being to hide from his creditors*—(Dubitante *Lord Kingsdown*).

QUESTION—*Even if P. had acquired a domicile in Scotland, whether the domicile of Mrs. P. could be deemed constructively to be in Scotland, so as to give jurisdiction to the Scotch Court*—(*Lord Kingsdown* affirmative—*Lord Westbury* negative).

OPINION—*Where an English husband, leaving his wife in England, goes to Scotland and resides there, but not so as to acquire a Scotch domicile, and even though his object was not to institute a suit of divorce there, the Scotch Court has no jurisdiction to entertain such suit*—Per *Lord Westbury L. C.*[1]

The pursuer (the respondent) having brought an action of divorce in 1860 in the Court of Session against his wife, in which she, *inter alia*, pleaded "no jurisdiction," the Lord Ordinary allowed "the pursuer a proof of the grounds set forth in the record on which he founded jurisdiction in this Court, and the defender a proof of her allegations on that head, and to both a conjunct probation."

The Lord Ordinary thus stated the outline of the facts after hearing the evidence.

"The present is an action of divorce by reason of adultery, purporting to be raised by Horace Pitt, commonly called the Honourable Horace Pitt, formerly Lieutenant Colonel in Her Majesty's Royal Regiment of Horse Guards, residing at Kilninver, in the county of Argyle, *pursuer;* against Mrs. Eleanor Sutor or Pitt, wife of the said Horace Pitt, residing at the Dell, Englefield Green, in the parish of Egham, in the county of Surrey, England, or elsewhere abroad, *defender.*"

"The defender objects to the jurisdiction of the Court, on the ground, that the pursuer is a domiciled Englishman. The pursuer maintains, that his domicile, as well as constructively that of his wife, is in Scotland, and that therefore the action is competent.

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[1] See previous report 24 D. 1444; 1 Macph. 106; 35 Sc. Jur. 59. S. C. 4 Macq. Ap. 627; 2 Macph. H. L. 28; 36 Sc. Jur. 522.