evidence, it is clear that the pursuers are entitled to recover, upon the principle of this being an agreement for an insurance entered into in Scotland, a contract entered into in Scotland,—the Act of 6. Geo. I. not extending to Scotland; and therefore the contract being a valid contract, the pursuers are entitled to recover damages, for the purpose of affording them compensation for the loss they have sustained by the breach of that agreement. On these grounds I should suggest, my Lords, that the judgment be affirmed, not in the terms in which it has been pronounced, but that, in your Lordships' opinion, the pursuers have made good their claim. The form of the judgment shall be prepared, and I will on a future day submit it for the opinion of your Lordships. June 27. 1828.

Respondents' Authorities.—Philip's Evidence, p. 550.; Fell on Guarantee, p. 58.; Marshall on Insurance, p. 349.; Stat. 6. Geo. I. c. 18.

TEESDALE, SYMES, and WESTON—SPOTTISWOODE and ROBERTSON,—Solicitors.

Sir NEIL MENZIES of Menzies, Bart. Appellant. No. 10.
D. of Fac. Moncreiff.
Earl of BREADALBANE and HOLLAND, Respondent.
Sol.-Gen. Tindal—Keay.

Property—River.—Held, (varying the judgment of the Court of Session), That an heritor was not entitled to erect a bulwark, or any other opus manufactum, on the banks of the river Tay, which might have the effect of diverting the stream of the river, in times of flood, from its accustomed course, and throwing the same upon the lands of an opposite proprietor, although it was alleged that the bulwark was intended to protect the heritor's lands from the flood.

July 4. 1828.

1ST DIVISION.
Lord Meadowbank.

THE river Tay, from the point where the water of Lyon joins it, runs eastward for some miles, and in that part of its course is bounded on the north by a plain about four miles long, and on an average about two-thirds of a mile broad, the property of Sir Neil Menzies. On the south the Tay is bounded by rising ground, occasionally very abrupt, and a flat, consisting of Bolfrax-haugh, nearly 21 acres, the property of the Earl of Breadalbane, and Farleyer Island, about 15 acres, the north half belonging to Sir Neil and the south half to the Earl. Bolfrax-haugh and the island are separated from each other by a slight hollow, now covered with a thick sward of grass, but which appears once to have been the ordinary channel of the river, and in floods is still the vent by which the swollen waters escape.

July 4. 1828.

In 1798 Sir Neil's predecessor applied to the Court, by bill of suspension and interdict, against the then proprietor, Alexander Menzies of Bolfrax, complaining that the latter 'had thought 'proper, of his own hand, and without any authority known or 'communicated to the complainer, to begin to erect a bulwark 'upon the upper end of this small spot of land, along the bank 'of the river, at the distance of four or five yards from the ordi-'nary channel, which bulwark, if allowed to be finished, must 'have the necessary effect of turning the great body of water, 'which formerly went down upon the south side in the old 'channel, towards the north upon the complainer's property, and 'thus overflowing the lands upon that side in a much greater 'degree than formerly, and of raising the body of water so con-'siderably upon the plains of that side as to be in its conse-'quences extremely destructive to the complainer and his tenants;' and praying that 'the further erection of the foresaid bulwark, 'or any other opus manufactum on the banks of the said river 'Tay, should be simpliciter suspended, and the said Alexander 'Menzies interdicted and discharged from further proceeding 'therein.' The Court (in the Bill-Chamber) granted interim interdict against 'the further erection of the foresaid bulwark, or 'any other opus manufactum upon the banks of the foresaid 'river Tay;' and afterwards, on the expede letters, remitted 'to '——— ———, engineer, to view and inspect that part of the 'river in question, its different channels, and to report the pro-'bable effects of the operations the respondent (Alexander 'Menzies) is carrying on, both as to the property of the com-'plainer, and that of him the respondent; as also to answer all 'pertinent questions that may be put to him by either of these 'parties at the time of the inspection.' No further steps were taken until in 1821, when the Earl of Breadalbane, who had in the mean time bought the property of Bolfrax, wakened and transferred the action against the present appellant, as the representative of Sir John, who was now dead; and the Lord Ordinary remitted to Mr Jardine, engineer, in the terms of the previous remit. Mr Jardine having visited the places in presence of the agents for the parties, reported, that 'the bottom of the 'valley, near the scene of dispute, being about four miles long, 'and on average about two-thirds of a mile broad, nearly level 'across, is composed entirely of gravel, sand, mud, and other 'alluvial matter, to an unknown depth, while both sides of the 'valley rise rapidly into rocky precipices. Indeed it is obvious 'that the river Tay has at different times traversed every part of

'the bottom of the valley, and washed alternately both of its 'rocky banks. The floods in the river Tay and tributary 'streams are frequent during the autumn, winter, spring, and 'sometimes rise to such a height as nearly to overflow the whole 'bottom of the valley, which has obliged the complainer to make 'fences, in the lower parts of the bottom of the valley, of stone 'piers or cut-waters, which support horizontally wooden rails, in- 'stead of the usual kind of fence employed in that place, composed 'of an earthen dyke and quickset hedge. The course of the old 'branch of the river Tay, which had run between Bolfrax-haugh 'and Farleyer Island, is still distinctly visible by a continuous 'hollow in the ground.' After describing the locality with reference to a plan, the report proceeded,—'Part of this old water- 'course has been ploughed, and the whole of it is covered with a 'thick sward of grass; and since the speats of the river have not 'preserved it in the state of bare gravel, this old water-course 'does not appear to be now a portion of the channel of the river. 'In defending haughs and holmes against the encroachments of 'a river which forms the common boundary between the lands 'of two conterminous proprietors, two methods have usually 'been adopted; one consists in facing the gravelly margin of 'the ordinary channel of the river, and sometimes part of its 'bottom, with stone and other heavy firm materials; and the 'other, in raising embankments of earth and other matters above 'the level of the surface of the haughs, at a distance from, and 'nearly parallel to the margins of the ordinary channel of the 'river, so as to form the banks of the extraordinary or flood 'channel of the river. The former method has been practised 'to a small extent below the mouth of Camuserny burn, on the 'northern or convex side of the ordinary channel of the river, 'where much more is still required to be done, and the latter has 'been employed at the upper end of Bolfrax-haugh. It is evi- 'dent, that in making embankments to confine the highest speats 'of rivers, for the purpose of preventing them from overflowing, 'the adjacent haughs, the embankments should be placed at a 'sufficient distance from the ordinary margins of the river, so as 'to form an ample water-way for the largest floods in their artifi- 'cial extraordinary channels. In applying these general views 'of the question to this particular case, it will be found that the 'embankment at the upper end of Bolfrax-haugh is too near the 'margin of the ordinary channel of the river, and that the jetty 'at the head of it is an encroachment on the alveus of the river.' The report then described the embankment to vary in distance from one to two yards from the margin of the ordinary channel

July 4. 1828.

July 4. 1828. of the river; to be 207 yards long, and its top nearly level, varying from three feet and a half to four feet above the level of the natural surface of the ground at its back; and the highest floods had not been observed to flow over the top of it. The engineer added, that he had drawn, upon the plan, lines along the haughs, representing 'the fronts of the nearest lines of embankment to the ordinary margins of the river that either party 'should be allowed to approach in making embankments, to prevent the speat waters from overflowing the other low haugh 'lands, although it should not suit the convenience of the other 'to avail himself of the same privilege at the same time; it being 'however highly desirable, in all such cases, that the encroachments should be made, at liberal distances from the ordinary 'margins of the river, on both at the same time.'

After this report was lodged, a record was prepared, and closed; and, on hearing parties, the Lord Ordinary declared the interdict 'perpetual, in so far as it prohibits and interdicts the Earl of Breadalbane from continuing to erect the 'jetty, or any other building, upon the alveus of the river 'Tay; but before farther answer as to the question of the 'Earl of Breadalbane being entitled to erect any jetty, bulwark, or other building upon the banks of the river Tay,' appointed parties to debate; and having thereafter ordered Cases on this point, and reported them to the Court, their Lordships, on the 4th July 1826, recalled the interdict, found the letters orderly proceeded, and the charger entitled to his expenses.*

Sir Neil Menzies appealed.

Appellant. The embankment complained of, though not on the ordinary alveus of the river, is within its extraordinary or flood channel; that is, within that space which is covered, not merely by the overflowing of the river, but by the rolling streams of its flood. It is thus an encroachment on the extraordinary alveus or proper water-way of the river in flood; is inconsistent with the fair and judicious management of the stream; and will force a great proportion of the river, when in floods, upon the appellant's estate. The danger of inundation has been hitherto greatly obviated by the old water-course, which, though now covered with grass, was not many years ago nothing but gravel. It has not been cultivated for more than forty years. It was originally part of the bed of the river, and at present forms part

---

* 4. Shaw & Dunlop, No. 474.

of the flood channel, and thus carries off the swollen waters, which if not allowed to escape by that conduit, must flow upon the opposite flat. But the erection of the embankment shuts up the gorge, and causes the flood to devastate the appellant's property for miles, whilst the advantage to the respondent is trifling, and not worth the expense of erecting it. The appellant cannot, from the intervention of tributary streams, effectually embank his side; and even if he could, the expense would be enormous. The respondent is using his property in emulationem vicini, and to the enormous injury of his neighbour. The jetty is not an ancient construction—is within the alveus—and forms part of the line of embankment complained of. The conclusion in the suspension and interdict was general, but its object was simply to prevent any opus manufactum which should form an obstruction to the proper water-way of the river in flood, or turn the flood-stream of the river from its natural and ancient course, and throw it on the appellant's property. There is no conclusion for the removal of any thing built or erected. The appellant's case rests on sound principles. A stream or river belongs in common property to the proprietors of the banks between which it flows; and of two opposite proprietors neither is entitled, without the consent of the other, to make any new works or opus manufactum by which the natural course of the stream or river may be altered. In re communi melior est conditio prohibentis, especially where great damage to the opposite proprietor would result from the change. No doubt, where there has not been any distinct separate servitude constituted against him, the common proprietor may take the natural and primary use of the water, even to its exhaustion; but otherwise the flumen is common, and its condition and nature cannot be changed against the will of the other proprietor. The restriction against operating on the alveus depends on this common right in the stream itself, not on any common right to the channel. In the latter, a centre line marks the boundaries; but as operations on the alveus alter the state of the stream, which is common property, the party not consenting to the alteration is entitled to be restored against it. This rule is applicable, not merely to the ordinary channel of a river, but to its extraordinary or flood channel. The one is as much the natural channel of the river as the other, and suited to the respective seasons of the year. There is no sound reason for saying that an opus manufactum is illegal in the former, and legal in the latter situation. The river in flood has its proper course and water-way just as

July 4. 1828.

July 4. 1828. much as in its ordinary state. To shew the truth of this it is only necessary to inquire, How will the operation affect the stream? and if the answer be, That it will either for the time, or permanently, change the course of the river, and injure the neighbouring proprietors, the remedy will be given. Besides, in the present instance, the respondent is shutting up one of the branches whereby the flood waters escape; and he is no more entitled to do so, than to run a bulwark across any channel that is filled with water from the beginning to the end of the year. He has not even the plea of preventing encroachment by the river on his own side; for the hollow is the river's natural and only mode of escape when swollen. Even if the respondent adopted the line marked out by the engineer, the mouth of this water-course would be shut; but that line he is not willing unconditionally to betake himself to.

Respondent.—The respondent's lands are exposed to inundations from the river Tay. There has stood from time immemorial a jetty somewhat within the alveus of the river; but the embankment the respondent's author contemplated was altogether free of the river, and entirely within his own grounds. As the legal step the complainer betook himself to does not conclude, for the erections being demolished, the jetty, a finished opus, must stand; and as to the contemplated extension of the embankment, the interdict is undoubtedly too wide, since it would prevent every embankment, even beyond the line of the rolling stream in flood, and such as the engineer states that a party ought to be permitted to make. On the law of the case, the respondent maintains, that he is entitled to protect his ground, from danger of overflow by banking the river out, and that he may make the bank of any form, size or structure, which he pleases, provided it be entirely within his own ground. He has not encroached on the alveus, or done any thing inconsistent with the fair and judicious management of the stream. It is clearly the indisputable right of every proprietor to keep the river within its ordinary bounds if he can. Indeed the very purpose of embanking is to prevent the river expanding into extraordinary bounds. There is no solidity in the appellant's distinction between the ordinary and the extraordinary current of the rolling stream of a flood. In one sense, there is an ordinary and an extraordinary current, namely, where there is a difference in the volume of the water in its usual channel. Accordingly, in deciding on the alveus of a river, you may measure up to the height of the stream, not as at its lowest

ebb, but at its general height, evinced by the regular and visible action of the water. The appellant, however, maintains, because in extreme cases the river may swell far beyond its usual limits, therefore the proprietor cannot bank it out, which would open every valley in the country to devastation. The space called the old water-course cannot be shewn to have been the 'constant bed of the river,' and it is not now part of the flood-channel in the proper sense of the word. From its elevation it cannot receive any of the swollen waters until the neighbouring plain is covered; so the damage is done before this alleged sluice comes into play. In point of fact, there has been no communication between this old water-course with the Tay within the memory of man; on the contrary, it has been for more than forty years cultivated like any part of the adjacent soil. Whether or not the expense which the embankment will cost is more or less than the advantage desired, is jus tertii to the appellant, and the plea of emulatio vicini is unfounded and misplaced. The respondent is willing to continue the embankment on the line drawn by the engineer, leaving to the appellant to make or not similar erections, as he sees proper. July 4. 1828.

The House of Lords ordered and adjudged, 'that the respon-
'dent ought to be prohibited and interdicted from the further
'erection of any bulwark, or any other opus manufactum, upon
'the banks of the river Tay, which may have the effect of divert-
'ing the stream of the river in times of flood from its accustomed
'course, and throwing the same upon the lands of the appellant;
'and that, with this declaration, the cause be remitted back to the
'Court of Session, to vary the interlocutors complained of in such
'manner as may be consistent with the above declaration, and to
'do further in the cause as may be just, and in conformity there-
'with.'

LORD CHANCELLOR.—My Lords, There is a case which was argued before your Lordships, at your Lordships' Bar, some time since,—an appeal from the Court of Session of Scotland in a case between Sir Neil Menzies and Lord Breadalbane; and I will beg to call your Lordships' attention particularly to this case, because I have the misfortune to differ in opinion from the Judges of the Court below. I will state to your Lordships the grounds of the opinion I have formed, and which have led me to that difference.

My Lords,—It is a question arising out of an embankment on the river Tay. The river Tay, on the north side, at the spot in question, is bounded by a considerable extent of flat land, belonging to Sir Neil

July 4. 1828. Menzies; on the southern side it is chiefly bounded by high land, but this high land terminates at a point called Bolfrax-haugh, which land belongs to Lord Breadalbane. Bolfrax-haugh continues for the space of about 27 acres, when there is another piece of land, Farleyer Island, part of which belongs to Lord Breadalbane, and between those two places there is a portion of the old channel, as if the water had formerly ran in that direction. My Lords,—There are some facts not at all in dispute in this case. Every person knows the character of the river Tay; and that in times of flood, that is, in autumn, winter, and in the spring, the flood stream takes its course with very considerable violence and force along this piece of land to which I have referred. It is therefore obvious, that an embankment running parallel to the stream, commencing at the first point of Bolfrax-haugh, and carried up to Farleyer Island, would have the effect of stopping up the old course of the flood stream, and throwing it entirely on the opposite piece of land belonging to Sir Neil Menzies; and the question in this case is, whether the proprietor of this land, Bolfrax-haugh, has a right so to do?

My Lords,—It is necessary I should give your Lordships a history of this case. The land which now belongs to Lord Breadalbane was formerly the property of Mr Alexander Menzies, and in the year 1778 he commenced these works, when he either formed or repaired a jetty in the alveus of the stream, and he connected with that jetty the embankment in question, which embankment is one or two yards distant from the course of the stream, about three feet in height, sufficiently high to turn the flood water of the river. Those works were carried on, I think, to the extent of about 200 yards. In consequence, Sir John Menzies, then the proprietor, filed a bill of suspension and interdict; an interim interdict was obtained, and further proceedings were carried on; but these further proceedings were all at once suspended, and the interdict continued till the year 1821. In the mean time, Lord Breadalbane purchased the property of Mr Menzies; and having purchased the property, he revived those proceedings. When the case came before the Lord Ordinary, as far as related to the jetty, and any other works in the alveus of the stream, he was of opinion the interdict should be continued; but he referred the question, as to the embankment upon the side of the river on the property of Lord Breadalbane, for further debate and consideration. It ultimately came before the First Division of the Court of Session, and the interdict, as far as related to the embankment, was dissolved. I should state also to your Lordships, that while this affair was going on before the Lord Ordinary, an engineer of considerable eminence, Mr Jardine, was, according to the course of proceedings in the Court of Scotland, directed, as the servant and officer of the Court, and standing between the parties, to view the place and report his opinion; and without going into the minute particulars of that report, I may state, that it is clear that if this embankment should be continued, as it is projected, along

the banks of the river, it will have the effect of throwing the ordinary flood streams of the river off the lands of Lord Breadalbane, and on the lands of Sir Neil Menzies. Many circumstances were referred to at the Bar, with respect to the law of England upon this subject. It is quite unnecessary to trouble your Lordships with any observation on the law of England, and particularly on the law of England with reference to particular places, because it is clear, beyond the possibility of a doubt, that by the law of England such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course, by a sort of new water-way, to the prejudice of the proprietor on the other side; and I am the less disposed to trouble your Lordships with reference to the law of England, for that can be referred to only by way of illustration. This case must be decided by the law of Scotland. Now, with reference to the law of Scotland, this is perfectly clear, that a superior heritor cannot direct any part of a stream to the prejudice of an inferior heritor. It is also clear, that an inferior heritor cannot do that which shall cause the water to stagnate, to the prejudice of the superior; that is acknowledged to be clear law. But it is said, that applies only to the alveus of the course. But it does not appear to me that there is any solid ground for the distinction. The ordinary course of the river, is that which it takes at ordinary times; there is also a flood channel: I am not talking of that which it takes in extraordinary or accidental floods, but the ordinary course of the river in the different seasons of the year must, I apprehend, be subject to the same principle. July 4. 1828.

But, my Lords, let us see what is said on this subject by the institutional writers on the law of Scotland. Erskine, in his Institutes, is distinct, as it appears to me, and precise upon the subject. He says,—'When a river threatens an alteration of the present channel, by which 'damage may arise to the proprietor of the adjacent or opposite ground, 'it is lawful for him to build a bulwark ripæ muniendæ causa, to pre-'vent the loss of ground that is threatened by that encroachment;' so that the proprietor whose lands are threatened to be washed away, may, for the purpose of protecting his own property in a case of that description, raise a bank for the purpose of his own security; but this bulwark must be so executed, as to prejudice neither the navigation, nor the grounds on the opposite side of the river; and as a guard against these consequences, the builder, before he began his work, was obliged by the Roman law to give security. Nothing, therefore, can be more distinct and precise than the language of Erskine in his Institutes, with respect to this particular case. He says, 'You may pro-'tect your own property from destruction;' so you may, by the law of England: but he says in distinct terms, 'Though the river threatens to 'change its channel and to encroach upon your land, you cannot pro-'tect yourself to the prejudice of the opposite proprietor.' Lord Stair

July 4. 1828. in his Institutes, though not so clear and precise, yet in general terms confirms that which is laid down by Erskine in his Institutes.

My Lords,—The language of the Roman law, according to the passages cited in the Case, confirms the same doctrine. It is there said, (39. Dig. t. 3. l. 1.) 'Opus quod quis fecit ut aquam excluderet, quæ 'exundante palude in agrum ejus refluere colet, si ea palus aqua pluvia 'ampliatur, eaque aqua repulsa eo opere agris vicini noceat, aquæ pluviæ 'actione cogetur tollere;' and, according to a passage quoted in the printed papers on the table of your Lordships, Voet repeats the same doctrine. In the Digest your Lordships will find another passage to the same effect, under the title 'De Aqua,' (lib. 39. tit. iii.) 'Hæc autem 'actio locum habet in damno nondum facto, opere tamen jam facto; hoc 'est de eo opere, ex quo damnum timetur, totiensque locum habet, quo-'tiens manufacto opere agro aqua nocitura est; id est cum quis manu 'fecerit quo aliter flueret, quam natura soleret; si forte immitendo eam 'aut majorem fecerit aut citatiorem aut vehementiorem; aut si compri-'mendo redundare effecit, quod si natura aqua noceret, ea actione non 'continentur.' It appears to me that that passage (and there are others to the same effect in the Digest) confirms the opinion laid down by Erskine in his Institutes with respect to the law of Scotland, in confirmation of which he refers to the Roman law. It is true that passages may be found in the Digest appearing to have a contrary tendency, but I think they may be all reconciled: or, consider the subject in this light, that these passages to which I am now alluding have reference to accidental and extraordinary casualties, from the flood suddenly bursting forth, and they go to this, that, in such a case, the parties may, even to the prejudice of their neighbours, for the sake of self-preservation, guard themselves against the consequence;—perhaps in this way the different passages in the Digest may be reconciled.

However, my Lords, the principal authority, as it was conceived in the Court below, and as it was at your Lordships' Bar, was a case decided in the year 1741,—the case of Farquharson *v.* Farquharson.* It was considered that that was a case directly in point; and if that had been a decision directly in point, I confess I should have had very great hesitation in declaring to your Lordships the opinion I am now doing. But I have read through that case, and attended to the different reports of it with the greatest attention, and I think that it is distinguishable in almost every particular from the case now before your Lordships. That was the case of the land of two proprietors on the river Cluny, on opposite banks of the river, which runs northward, and falls into the river Dee. Auchindyne grounds were on the left bank; Invercauld's grounds on the right. Invercauld on his grounds had erected a mound, and the question was as between him and Auchindyne, whether he was entitled to erect that mound; and it was decided that he was. But the circumstances were of this description:—The river had been con-

---

* The papers were reprinted, and laid before the House.

tinually going to the eastward. It had in one instance actually departed from its original course, and taken a new direction, placing a part of Invercauld grounds on Auchindyne side, and was obviously repeating, or attempting to repeat, the same operation by encroaching on Auchindyne grounds. The mound erected, therefore, was not to have the effect of altering the old course of the river, but it was to have the effect of preventing the old course of the river from being altered; and that, I apprehend, is a most material distinction in cases of this kind. But, my Lords, independently of this, there was evidence to shew, that at least a considerable part of the bank was built on old foundations. There was further evidence of this description, which, with respect to cases like the present, is of the most important character, that, according to the custom of that part of the country, proprietors on the opposite sides of the rivers had embanked against each other; and in this particular case it was proved, that Auchindyne had himself embanked on his side of the river, for the purpose of preventing the overflow of the water on his side, so as to throw it on Invercauld; and it was proved also as the last circumstance, that the destruction of the grounds of Invercauld would have followed if these works had not been allowed, and that the most trifling damage in point of amount was occasioned to the proprietor on the other side. It was under these circumstances, with all these facts appearing, that the Court gave their opinion in favour of Invercauld. Now I think that your Lordships will be of opinion, that that case is distinguishable in all its particulars from the present. That was a dam erected to prevent a change in the course of the water, and it was sanctioned also by the custom in that part of the country, and sanctioned also by the practice which had prevailed as between those different and opposite proprietors. Under these circumstances, I should humbly submit to your Lordships, that Lord Breadalbane in this case ought not to be allowed to carry on this work to the prejudice of Sir Neil Menzies, and that the judgment of the Court below cannot be sustained. The interdict is in terms too extensive, because it prevents new opus manufactum on the banks of the river without qualification. It will be necessary, in the form of judgment, that that should be in some way qualified. I shall, therefore, prepare a judgment, and submit it to your Lordships' consideration.

July 4. 1828.

Appellant's Authorities.—2. Ersk. 1. 5. and 2. 9. 13.; Dict. voce Property; L. Glenlee, March 10. 1804, (12,834.); Hamilton, March 5. 1793, (12,824.); Dick, Nov. 16. 1769, (12,813.); Town of Aberdeen, Nov. 22. 1748, (12,787.); Fairlie, Jan. 26. 1744, (12,780.); 39. Dig. t. 3. l. l. § 2.; 39. Voet, 3. 4.

Respondent's Authority.—Farquharson, June 25. 1741, (12,779. and No. 5. Prop. Elch.)

SPOTTISWOODE & ROBERTSON—J. CHALMER,—Solicitors.