1042, 15 S.L.R. 697. The pursuer maintained that the access offered by the defender was not such as he was bound to accept, and that he was entitled to the particular line of access which he claimed.

Argued for the defender—In the absence of some relation between the parties other than neighbourhood, the defender was under no legal obligation to provide the pursuer with an access through his lands. There was no authority in the law of Scotland for such a contention.—Stair ii. 3, 79; ii. 7, 10; Erskine ii. 9, 12. Even if the law were as maintained by the pursuer, he was not, in fact, shut out from his own property. His own lands lay immediately on the other side of the river, and he could obtain access by a ford or a bridge.

At advising—

LORD TRAYNER—The pursuer claims right to the road in question on three grounds—(1) that it is an access of necessity; (2) that it is a part and pertinent of his lands; and (3) that at all events he has acquired a right of servitude over the road by prescription.

With regard to the first of these grounds it was maintained by the pursuer that if his land was so situated that he could not get access to it except over his neighbour's land, his neighbour was legally bound to afford such an access. I cannot admit the soundness of that proposition. If a man buys land to which there is no access (although such a thing is scarcely conceivable) he is obviously buying something in itself of no marketable value. But according to the pursuer's contention that man's neighbour is bound to dedicate a part of his own property to afford an access, that is, the neighbour is, to his own loss, to do something which will enhance the value of the property of another. I quite understand that where anyone acquires land from another he may require that other to give him both ish and entry to and from the land acquired. But where there is no relationship such as seller and buyer or superior and vassal between the two, and nothing but mere neighbourhood, I see no authority or principle which could sustain the pursuer's contention. But assuming the soundness in law of the pursuer's contention, it cannot be sustained here, because the necessity which is the foundation of that contention is here non-existent. The pursuer has ample means of access to the land called Farleyer Island without resorting for such to his neighbour's land. He has access to it by fording the river, he can have access to it by boat, or he may erect a bridge connecting Farleyer Island with the lands of Menzies on the opposite bank of the Tay. These modes of access may not be the most convenient or the cheapest, but the defender has nothing to do with such considerations. The plain fact is that the pursuer has or can afford himself access to Farleyer Island without going on the defender's land. The "necessity" on which his first ground of claim is based fails in fact, and the legal argument founded on the supposed or alleged fact fails as a consequence.

On the second and third grounds of the pursuer's claim I am of opinion that the pursuer has failed to prove such possession in point of extent, character, and time as are necessary to establish that the road in question is a part and pertinent of the pursuer's lands, or to establish by prescription a right of servitude over the road.

I do not differ from what the Lord Ordinary says with regard to the reasonableness and sufficiency of the access from the east which the defender has offered to the pursuer, or the reasonableness of the defender's offer as to the use of the west gate. But I do not regard these as material to the decision of the case. If the pursuer and defender can come to an agreement about this access well and good. But the pursuer claims certain things as his of legal right, which I think he has failed to establish. I would therefore merely sustain the defences and assoilzie the defender.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against and assoilzied the defender.

Counsel for the Pursuer and Reclaimer—Campbell, K.C.—D. Anderson. Agents—W. & J. Cook, W.S.

Counsel for the Defender and Respondent—Wilson, K.C.—Dewar. Agents—Davidson & Syme, W.S.

Friday, November 1.

SECOND DIVISION.

[Sheriff of Perth

MENZIES *v.* MARQUIS OF BREADALBANE.

Property — Boundaries — River — Alveus — Medium filum — Mode of Ascertaining Medium filum where Channel Divided by Islands.

The proprietor of a barony on the north bank of the Tay, near Aberfeldy and admittedly bounded by the *medium filum* thereof, brought an action against the *ex adverso* proprietor, whose lands were bounded by the "water of Tay," for declarator that certain gravel banks or islands belonged to the pursuer, in respect that they lay wholly on his side of the *medium filum* of the river. It was proved that at the point in dispute the Tay ran beween well defined banks, but was divided by the islands into two channels; that the greater body of water flowed down the south or defender's side of the islands; that when the river was ordinarily full a certain quantity always flowed down the north channel, although opposite one of the islands that channel was sometimes apparently dry for about two months during summer.

Held that the *medium filum* fell to be ascertained by taking the centre line of the bed or channel in which the water ordinarily ran between its banks, as shown by the permanent marks made by it, and drawing such line through any such sand or gravel banks as the islands in question, without carrying it round that particular channel in which for the time the greater body of water is flowing.

This was an action brought by Sir Robert Menzies of that Ilk, Baronet, in the Sheriff Court at Perth, against the Marquis of Breadalbane, in which the pursuer sought declarator that two islands or banks known respectively as the Taybridge or Sir Robert's Island and Dunskiag or Farochil Island, situated in the river Tay, were the property of the pursuer, as being part or part and pertinent of the barony of Menzies, belonging to him.

The pursuer averred that the islands in question lay *ex adverso* of his lands, which were situated on the north bank of the river Tay, the defender being proprietor of the lands on the south bank. He averred that the main channel of the river flowed between the said islands and the lands of the defender, and that both islands were situated entirely upon the north or Menzies side of the *medium filum* of the river; that the channel between them and the pursuer's other lands was only a subsidiary water-course, which was generally dry in summer, or when the water was low, and that it formed no part of the true course or channel of the river.

The defender in answer averred that the islands in question were situated in the *alveus* or channel of the river; that the pursuer and defender had the property of the *alveus ad medium filum;* and that a large part of both islands was situated on the south or Breadalbane side of the *medium filum.* The defender denied that the river Tay and the channel or current thereof were entirely on the south side of said islands.

The pursuer pleaded — "(1) The said islands being part of or parts and pertinents of the pursuer's barony of Menzies, he is entitled to decree as craved. (2) The said islands, or one or other of them, being situated on the north or Menzies side of the *medium filum* of the river, the pursuer is entitled to decree as craved."

The defender pleaded—"(2) The defender is entitled to absolvitor in respect (*a*) that the said islands are situated in the *alveus* or channel of the river dividing the parties' lands; (*b*) that the *alveus* is the property of the parties *ad medium filum;* (*c*) that the islands belong in property to the parties according to that line; and (*d*) that part of each of the said islands is situated on the defender's side of the said *medium filum,* and is his sole property.

Proof was allowed and led.

The import of the evidence is sufficiently set forth in the interlocutor of the Sheriff-Substitute.

On 9th January 1901 the Sheriff-Substitute (SYM) pronounced this interlocutor—"Finds in fact (1) that the pursuer is proprietor of the barony of Menzies in the county of Perth, to which he succeeded in 1844, and that it is not disputed that at the part of his estate which is referred to in this action his boundary is the *medium filum* of the water of Tay; (2) that the noble defender is proprietor of the lands of Bolfracks, Wester Aberfeldy, and others on the opposite side of the water of Tay, which lands are included in certain parishes lying to the south of said river Tay, and are bounded on the north 'by the water of Tay;' (3) that in the water of Tay, a short distance above Aberfeldy, where it flows between the pursuer's and defender's lands, there are two banks or islands of gravel and sand, upon which grow scrub, grass, and small trees, which islands are generally known as the Taybridge Island and Dunskiag Island, though each is known sometimes and to some persons by other names; (4) that these islands have been formed in the channel by gravel and sand being deposited by the action of the river, and that both are gradually increasing; (5) that at this part of its course the Tay runs between well-defined banks on either side, and in the case of both islands the greater body of the water of Tay, divided by the said islands, goes down the southern channel, *i.e.*, the defender's or Aberfeldy side; (6) that the tendency that the greater body of the water shall go down that side is rather increasing by the swift flow of the stream scouring the southern channel and undermining the southern bank, which is to some extent of clay and soft material, and in the case of the bank above the Taybridge Island is specially exposed to such action by a bend in the stream; (7) that both islands lie rather to the north side of the middle of the channel as defined by said river banks, and that a line drawn down the channel of the river equidistant between said banks will pass longitudinally through each of said islands; . . . (10) that with regard to the Taybridge Island, which is about 645 feet long at its longest part and 238 feet 6 inches at its broadest part, the channel on the north is during dry weather dry or apparently dry, with a certain amount of percolation through the gravel, and also with a certain amount of dead or back-water standing at the upper end; (11) that this condition of the stream may last for about two months in many seasons, but in others, as for example throughout the year 1900, it does not exist at all; (12) that at times when the river is ordinarily full there is always a current down the north channel, and a great body of water passes down it whenever the river is in spate; . . . (17) with regard to Dunskiag Island (which is about 1400 yards higher up the river than the Taybridge Island, and is about 717 feet long at the longest part and 114 broad at the broadest part), that the northern channel is practically never dry, but always carries a considerable amount, and at times a great body of water . . . With these findings of fact—Finds as matter of law (1) that where a river flows between well-defined banks, as described in

said findings of fact, the manner of ascertaining the *medium filum* in fixing the marches between two proprietors having respective rights *usque ad medium filum*, is to take the centre line of the bed or channel in which the water ordinarily runs between said banks, as shown by the permanent marks made by it, and to draw such line through any sand or gravel banks such as constitute the Taybridge and Dunskiag Islands, without carrying it round that particular channel in which for the time the greater body of water is flowing: Therefore repels the pursuer's pleas-in-law, and assoilzies the defender from the conclusions of the action: Finds the defender entitled to expenses," &c.

The pursuer appealed to the Sheriff (JAMESON), who on 30th March 1901 adhered to the interlocutor of the Sheriff-Substitute.

Note.—. . . . "This is a question of a disputed boundary, and the pursuer maintains, in the first place, that, looking to the circumstances of the case, the *alveus* of the river Tay at the places in question must be held to be confined to the channels between the south sides of the islands in question and the southern bank of the river, and he relied upon the case of *Wedderburn* v. *Paterson*, 2 Macph. 902, and especially on Lord Barcaple's observations on page 906. With regard to these observations, I may remark, in the first place, that they are *obiter*, and in the next place, that the case there under consideration was one of salmon-fishings and tidal waters. On these and other grounds, I consider the observations founded on inapplicable in the present case. Counsel also referred to the case of *Lord Zetland* v. *Glovers' Incorporation of Perth*, 8 Macph. (H.L.) 144; but, again, that case referred to salmon-fishings and tidal waters, and in my opinion does not give any assistance in considering the circumstances of the present case. Counsel for the defender referred to what strikes me as a very sensible definition of the *alveus* of a river, taken from the American Reports, and quoted in the case of *Hudson* v. *Ashby*, L.R. (1896), 2 Ch. at p. 25—"The bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to maintain it at its average and mean stage during the entire year without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn." This definition, which I think is sound, would, when applied to the facts of the present case, include the whole of the bed of the Tay between the north and the south banks thereof, including the islands at the places in question; and the *medium filum* would pass down through the islands in the line shown as the division of the parishes of Weem and Dull on the Ordnance Survey map, No. 7 of process, and this line in my opinion forms the true boundary between the pursuer's and the defender's properties at the places in question. Defender's counsel also referred to the case of *Gibson* v. *Bonnington Sugar Refining Co., Ltd.*, 7 Macph. 394, and particularly the remarks of Lords Cowan and Benholme on p. 399. So far, then, as the pursuer's claim is founded on the rule of law applicable to the case of two properties having a river as their mutual boundary, I am of opinion that this case fails on the facts to which the rule of law falls in the present case to be applied, in respect that neither of the islands in question lies wholly to the north of the *medium filum* of the river Tay." . . . .

The pursuer appealed to the Court of Session, and argued — The Sheriff had adopted a wrong principle in determining the *medium filum* of the river; he ought to have disregarded the north channel, which was practically dry, and have taken the *medium filum* of the main stream, in which alone there was a constant flow of water.—*Wedderburn* v. *Paterson*, March 22, 1864, 2 Macph. 902, per Lord Barcaple, at p. 906; *Earl of Zetland* v. *Glovers' Incorporation of Perth*, July 11, 1870, 8 Macph. (H.L.), 144, 7 S.L.R. 668; *M'Braire* v. *Mather*, June 29, 1871, 9 Macph. 913, 8 S.L.R. 601. The Sheriff-Substitute's findings in fact were sufficient to support the pursuer's contention if the law laid down in these cases were applied. The rule adopted by the Sheriff resulted in depriving the pursuer of access to the bank of the main stream, and therefore of exercising his right of fishing at the point in question.

Argued for the defender and respondent—The Sheriff had adopted the correct principle. The cases cited by the pursuer had reference to rights of fishing between *ex adverso* proprietors, and had no bearing upon the present question, which was as to the boundaries of lands. The *alveus* of a river was the space between its ordinary banks, and the pursuer was not entitled to disregard a smaller channel—*Hudson* v. *Ashby* (1896), 2 Ch. 1; *Jackson* v. *Marshall*, July 4, 1872, 10 Macph. 913, 9 S.L.R. 576; *Bicket* v. *Morris*, July 13, 1866, 4 Macph. (H.L.), 44, per Lord Cranworth at p. 50, 2 S.L.R. 222, at p. 227; *Gibson* v. *Bonnington Sugar Refining Co.*, January 20, 1869, 7 Macph., 394; *Pool* v. *Dirom*, July 9, 1823, 2 S. 416.

At advising—

LORD TRAYNER—In this case the parties are riparian proprietors on the Tay *ex adverso* of each other. Their lands being respectively bounded by the Tay, they are each proprietors of the *alveus* of the river up to the *medium filum*, and the question is, where is the *medium filum* at the point in dispute. It appears that at this point the greater part of the water flows down on the defender's side, and the pursuer's contention is that the *medium filum* is to be found in the centre of the stream flowing down on the defender's side, because there is no water, or practically no water, left on his, the pursuer's side. I think the pursuer is wrong both in fact and law. At the point in question the Tay flows between well-defined banks. When ordinarily full the river covers the whole *alveus* from

bank to bank, although even then there is more water on the defender's than the pursuer's side, because the channel which the river has made for itself is deeper on the defender's side than on the other. But it is not now open to controversy that where the water of a river in its ordinary condition covers the *alveus* from bank to bank it is the centre of the *alveus* between the banks that is the *medium filum*, and consequently the boundary of the properties on the opposite banks. If the pursuer's view were adopted, the boundary of the lands on either side would be constantly changing, according to the state of the river in dry weather and wet. I think the Sheriff was right, and that the appeal should be dismissed.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court dismissed the appeal, found in fact and in law in terms of the findings in fact and in law in the interlocutors appealed against, and assoilzied the defender.

Counsel for the Pursuer and Appellant—Campbell, K.C.—D. Anderson. Agents—W. & J. Cook, W.S.

Counsel for the Defender and Respondent—Wilson, K.C.—Dewar. Agents—Davidson & Syme, W.S.

Friday, November 1.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

BREMBER *v.* RUTHERFORD.

Partnership — Holding out — Diligence — Charge—Decree against Firm not Warrant for Diligence against Person not Partner even if Proved to have Held Himself out as Partner.

Held that a decree against a firm was not a warrant for executing diligence against a person who was not a partner of the firm, even although he might be proved to have held himself out as a partner so as to incur liability to third parties.

On 11th December 1890 John Rutherford, joiner, Annan, obtained decree in the Small Debt Court at Dumfries, against Brember & Company, chemists, 134 High Street, Annan, for £9, 19s. being the amount of an account for tenant's fittings in their shop at Annan executed in May and June of that year.

On 8th January 1901 William Brember, hotel-keeper, Strathaven, was charged, "as one of the partners of Brember & Company above designed, as such partner and as an individual" to implement the said decree within ten free days from that date under pain of poinding and sale, if the same be competent without further notice.

Brember presented a note of suspension against Rutherford, praying the Court to suspend the charge.

The complainer averred—"The complainer is not, and never was, a partner of the said firm of Brember & Company, nor is he in any way responsible for their obligations. In particular, he is not in any way responsible for the charger's claim against the said firm, and is not liable to be called upon to make payment of said claim, either as a partner of said firm or as an individual. The complainer was not in any way affected by said decree, and there is no warrant for the execution of diligence against him at the instance of the charger."

The complainer pleaded, *inter alia*—"(1) There being no warrant for the execution of diligence at the instance of the charger against the complainer, the proceedings complained of should be suspended. (3) The complainer not being a partner of said firm of Brember & Company, and not having held himself out as such, is entitled to have the said charge suspended as concluded for."

The respondent pleaded, *inter alia* — "1. The complainer being the proprietor of the business carried on under the firm name of Brember & Company, and being liable for the debts thereof, said charge is orderly proceeded, and the note should be refused. 2. The complainer being one of the partners of the firm of Brember & Company, is liable for the debts thereof, and the note should be refused. 3. The complainer having by his actings held himself out as (1) owner, and (2) as partner of said business, and the respondent having relied on his name and credit as such owner and partner, the note should be refused."

On 26th January 1901 the note was passed, and on 26th February 1901 the Lord Ordinary (STORMONTH DARLING) allowed a proof, which was taken on 12th March.

Thereafter on 28th March 1901 the Lord Ordinary (STORMONTH DARLING) sustained the third plea-in-law for the respondent, found the charge orderly proceeded, and refused the note of suspension.

Note.—[*After a statement of the facts*]—"Rutherford seeks to justify the charge on the ground either that Brember was in fact a partner or that he held himself out as such. It is admitted on record that Brember was tenant of the shop for a year from Whitsunday 1900, but that circumstance is not enough to make the charge good, because the decree was taken against Brember & Company, and not against Brember individually as tenant. It is proved to my satisfaction that he was not in point of fact a partner in the business nor the owner of it. He contributed by way of loan the greater part of the capital with which the business was started, but the business itself belonged to one Flynn, Brember's brother-in-law, who traded under the name of Brember & Company," for a reason (*which it is not necessary to specify*), "and it was thought desirable both by Brember and himself that his own name should be kept dark.