

“ expense of process of ranking and sale of bankrupt estates
 “ before the Court of Session is usually defrayed; and the
 “ judges of the said Court of Session are hereby directed
 “ and empowered, to issue their warrants for payment of
 “ such expense to the person or persons who shall advance
 “ the same.” In this state of the law, there is not the
 slightest ground for the present appeal.

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The Lord Chancellor, when delivering judgment in the preceding appeal, at same time moved simply, that the present appeal be dismissed, and the interlocutors complained of be affirmed.

It was ordered and adjudged, that the interlocutor be affirmed.

For Appellants, *R. Dundas*.

For Respondent, *G. Ferguson*.

MESSRS. ROBERT SCOTT MONCRIEFF, and
 DAVID DALE, Cashiers of the Royal Bank
 of Scotland, and Wm. SIMPSON, Cashier } *Appellants* ;
 at the said Bank, Edinburgh, .

JAS. DUNLOP, Merchant in Glasgow, AN-
 DREW HOUSTON of Jordanhill, JAS. GAM-
 MELL, Merchant in Greenock, and JAS.
 MACDOWALL, Merchant in Glasgow, } *Respondents*.
 Bankers in Greenock, trading under the
 Firm of DUNLOP, HOUSTON, GAMMELL and
 Company,

House of Lords, 17th July 1797.

BANKING Co.—AGENT—PARTNER—POWERS TO BIND COMPANY.—

The Greenock Banking Company had an agent in Glasgow, Mr. Dunlop. It being necessary to enter into arrangements with the several banks to receive their notes, this was done through means of their agent. Afterwards Mr. Dunlop entered into a new transaction by which this object was to be carried on more to the satisfaction of both parties. Held, on the failure of Dunlop, that, from the terms of the transaction gone into, the bank was not sufficiently bound by the acts of their agent and partner.

The respondents having opened a bank in Greenock, the Company affairs were managed by Mr. Gammell in Greenock, and by Mr. Dunlop in Glasgow.

Desirous to establish their credit, they entered into the usual

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arrangements, in regard to other banks receiving the notes they issued; and among the rest, with the Royal Bank, through its manager in Glasgow, Mr. Scott Moncrieff, in the following terms:—“*Greenock, 28th July 1785*,—Scott Moncrieff, Esq.,—Sir, Messrs. Dunlop, Houston, Gammell, and Co., having opened a bank here, and appointed me their cashier, I have to inform you, that Mr. James Dunlop of Garnkirk will exchange with you regularly once a-week, what of this Company’s notes may come into your hands, and upon your advising me what day of the week is most convenient for you to exchange notes, I will give Mr. Dunlop notice thereof. I am, &c., (Signed) JAS. MILLAR.”

Messrs. Scott Moncrieff and Dale answered in these words:—“*Royal Bank Office, Glasgow, 1st August 1785*.—Sir, We duly received your favour of the 28th past, and, agreeable to your proposal, shall make a weekly exchange of notes with your Company, and give or take a bill on Edinburgh, at one day’s date, for the balance, as is our practice with the other banks here. If not attended with any inconvenience to you, we would propose to make the exchange on the *Tuesday* morning at eight o’clock, when we settle with the other banks. Of this you will be pleased to acquaint Mr. Dunlop.—We are, &c.

(Signed) “SCOTT MONCRIEFF & DALE.”

It was alleged by the respondents that these letters were all that ever passed between their office at Greenock and the appellants.

The parties entered on the transaction as thus arranged; but it was not long until the Royal Bank found, that from the great flow of their paper into their hands, which lay dead until the day of exchange, considerable loss was sustained, and they therefore entered into a new arrangement with Mr. Dunlop, to have the exchange of notes twice a week; and a bill granted at one day’s date for any balance that may be found in their favour. This arrangement, it seems, was gone into verbally with Mr. Dunlop, but it was proved by the following letter, that Mr. Dunlop communicated this alteration to Mr. Gammell at Greenock:—*2d July 1789*,—“I have settled with the Royal Bank that we shall exchange with them every Saturday morning, which I expect to manage, so that it shall make no alteration in the operations of the Greenock Bank, but shall come all under the Tuesday’s exchange with me. . On considering the matter, I thought it better to make the communication to Mr. Scott

“ by word of mouth than by letter, which keeps us perfectly open, in case of any future change in their arrangements.—I am,” &c. Mr. Gammell answered :—“ I am favoured with your letter of yesterday’s date, with the enclosure, which is perfectly satisfactory. I am pleased that you have informed Mr. Scott Moncrieff that you are to exchange with him twice a week, and the mode you propose I think will be attended with no loss to the bank, at same time it pleases them.—I am,” &c.

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Notwithstanding this arrangement, repeated complaints were made by the Royal Bank, in consequence of the overflow of the Greenock Bank notes into their bank, which no sooner were exchanged the one moment than they were returned back upon them the next, until they were obliged to remonstrate, which gave rise to the transaction or agreement out of which the present action arises. This agreement was prefaced by a correspondence, which complained generally of the mode of conducting the exchange, and the daily loss of interest sustained by the Royal Bank, and proposed, “ that in future Mr. Dunlop should keep an account with us like any other man, on such credit as should be agreed on, and that on every second day (Tuesdays, Thursdays, and Saturdays) we should pack up all the Greenock notes we had, and deliver them over to him, for which he should give us an order on his account with us.”

Some of the complaints were made to Mr. Gammell, but the greater part to Mr. Dunlop.

Accordingly, a draft of the letter of agreement was sent by Mr. Scott Moncrieff to Mr. Dunlop (*Vide* below). Mr. Dunlop

Draft proposed by Mr. SCOTT MONCRIEFF.

“ GENTLEMEN,—In the management of the business of the Greenock Banking Company, and that I may be enabled to take up their notes from you in a manner more convenient for *us both* than hitherto, I shall be glad to open a cash-account with *you*, as cashiers of the Royal Bank here, *to be kept* in the name of James Dunlop, *for the Greenock Banking Company*; and I propose that my operations upon the account shall be as follows :—I shall, three times in the week, viz. upon Tuesdays, Thursdays, and Saturdays, take up such of the notes of the Greenock Banking Company as may come into your hands, by giving an order on my account with you for the amount; and I shall make payment to you upon said account on your receipts in the manner most convenient for myself, either by notes of

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returned the letter, signed by him, after making a few alterations on its terms, on which alterations much stress is made in this action. The letter returned was as follows:—

“ *Glasgow, 1st Jan. 1793.* GENTLEMEN,—As agent for the
 “ Greenock Banking Company, and that their notes may be
 “ exchanged with you in manner more convenient for both
 “ you and *me* than hitherto, I am very well pleased to open
 “ a cash-account with you, as cashiers of the Royal Bank
 “ here, *to be kept* in the name of James Dunlop, *agent for*
 “ *the Greenock Banking Company*; and propose that my
 “ operations on that account shall be as follow:—I shall,
 “ three times in the week, take up such of the notes of the
 “ Greenock Banking Company as they come into your hands,
 “ by giving you what Royal Bank notes I may have, and
 “ an order on my account with you for the balance; and I
 “ shall make payment on said account, on your receipt, in
 “ manner most convenient for myself, either by the notes of
 “ other Banking Companies bills on Edinburgh or London,
 “ it being understood that you are to take such bills from
 “ me upon the same terms you do from others. The account
 “ shall be settled once a year, or oftener, if either party re-
 “ quire it; the interest to be charged against me at five
 “ per cent., and you are to allow me four per cent. on such
 “ sums as I may occasionally overlodge with you. Until I

other Banking-companies bills on Edinburgh or London, it being understood that you are to take such bills from me upon the same terms that you do from others. The account shall be settled at least once a year, or oftener, if either party desire it; the interest to be then charged against me at five per cent, and you are to allow me four per cent. upon such sums as I may occasionally overlodge with you. Until I see the effect of the arrangement, I cannot say exactly what extent of credit I may require upon this account; but it will always be in your power to limit it; and I shall at any time, upon three or four weeks warning, pay up such balance as may be due to you. It is further understood, that as this account is proposed to be opened for our mutual conveniency, it shall at all times be in the power of either of us to close it, when we think that purpose is not answered by it.”

Form of Order annexed.

£ Glasgow,
 Pay the bearer pounds, which place to the
 debit of my account. For Greenock Banking Company.

J. D.

“ see the effect of this arrangement, I cannot say exactly
 “ what extent of credit I may require upon this account;
 “ but it will always be in your power to limit it; and I shall
 “ at any time, upon six weeks’ notice, pay up such balance
 “ as may be due to you. It is further understood, that as
 “ this account is proposed to be opened for our mutual con-
 “ veniency, it shall at all times be in the power of either of
 “ us to close it when we shall think that purpose not an-
 “ swered by it.—I am, &c.

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(Signed) “ JAMES DUNLOP.”

Copy order sent.

Pay to the bearer £2226. 19s., and charge the same
 to account of JA. DUNLOP.

Of this date, Mr. Scott Moncrieff wrote Mr. Simpson as Jan. 1, 1793.
 follows:—“ I met Mr. Dunlop last night, and carried with
 me the scroll of a letter which I thought it would be neces-
 sary for him to write to us, as the foundation of the pro-
 posed account, and that we might clearly understand each
 other. He approved of it, and brought here his letter this
 morning accordingly, with some trifling alterations. You
 have annexed an exact copy of it. I mean, if you approve
 of it, to make out another copy, and send it to him, saying
 at the foot of it, that we agree.” “ *I think the Banking
 Company is sufficiently bound, the account being opened with
 him, their agent.*”

Accordingly, the letter, approving of this letter, was writ-
 ten to Dunlop, and the transaction closed; and, immedi-
 ately thereafter, the account was opened. The new arrange-
 ment was communicated to Gammell, the acting partner of
 the Greenock Bank, by Dunlop, as follows:—

“ The Royal Bank have been complaining very much
 “ of late, and perhaps with some reason, of the number of
 “ notes that were thrown in upon them, especially on the
 “ Saturdays; and, two or three days ago, Mr. Scott Mon-
 “ crieff called, and told me that he had orders from the
 “ directors at Edinburgh, either to refuse our notes alto-
 “ gether, or to send them to Greenock on purpose every
 “ day, which, he said, would be much cheaper to them than
 “ the way they are in at present; which, indeed, I believe
 “ may be true. I said, if such measures as those were re-
 “ sorted to, I believe we could procure as many of their
 “ notes as they could do ours. He said, however that might

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“ be, he had directions to make the experiment; at the
 “ same time, he would be extremely sorry to take a step of
 “ that kind, if any plan could be fallen on to prevent it. I
 “ told him that I could think of none, for I could by no
 “ means advise the Greenock Bank to alter the mode of
 “ making their exchanges, which had been settled by mu-
 “ tual agreement. At the same time, as the management of
 “ these exchanges *had been left entirely to me*, if he could
 “ think of any way in which I, as agent, could accommodaté
 “ them, I would have no objection to try it. After several
 “ conversations, he at last made a proposal, which I told
 “ him I would make a trial of, with which he seemed very
 “ well satisfied; and, in my opinion, will make so very little
 “ difference, if any, to me, that I can continue to settle the
 “ exchanges with the bank in the same way as formerly;
 “ *and I agreed the more readily*, as I think it will prevent a
 “ great number of notes from going to Edinburgh; the pro-
 “ curing of Edinburgh money, *to replace which has been at-*
 “ *tended not only with expense to the bank, but lately very*
 “ *great trouble to me*; and no doubt it has also been trouble-
 “ some to Sir William Forbes & Co.”

Mr. Gammell's answer to Mr. Dunlop was as follows:—

“ 1st January 1793.—I am glad you have settled
 “ matters with Mr. Scott Moncreiff, and that upon such a
 “ plan as will prevent our notes from going to Edinburgh,
 “ which was troublesome to all parties concerned.”

Mar. 1, 1793. Sometime after the operations were entered on, and in
 consequence of the public state of credit, the Royal Bank
 found it necessary to restrict their advances, and to give
 orders to close this account in the beginning of March
 1793. Accordingly, Mr. Scott Moncrieff wrote to Mr.
 Dunlop, calling up the balance owing; but these applica-
 tions had produced no result, when, on the 21st March, Dun-
 lop failed. This event was first communicated to the Royal
 Bank by Mr. Gammell, who at same time intimated, that as
 the transaction was one with Mr. Dunlop alone, the Green-
 ock Bank did not hold themselves liable for the balance due
 of their notes delivered to Mr. Dunlop. Upon denying
 their liability, the present action was raised against the
 Greenock Bank, under the firm of Dunlop, Houston, Gam-
 mell & Co., for payment of the balance due, amounting to
 £9100. of principal, and £82. 2s. 11d. of interest.

In defence the respondents pleaded,—“That the part-
 “ ners of the Company of Dunlop, Houston, Gammell, & Co.,

“ bankers in Greenock, are not liable as a Company for the
 “ sums now sued for, they having given no authority to
 “ James Dunlop to enter into the agreement with the pur-
 “ suers for a cash account, which the pursuers solely entered
 “ into; on the risk of the said James Dunlop, as an indivi-
 “ dual.”

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The Lord Ordinary reported the case to the Court, and this interlocutor was pronounced:—“ Upon report of Lord Nov. 14, 1794.
 “ Craig, and having advised the mutual informations for both
 “ parties, with minutes of debate, the Lords sustain the de-
 “ fence, assoilzie the defenders as a Company, and decern;
 “ but remit to the Lord Ordinary to hear parties how far
 “ any of the partners of the Company are liable as indivi-
 “ duals, and to do as he shall see cause.”

This reservation in the interlocutor was occasioned by its appearing to the Court, that though there seemed to be a defect of evidence to charge the Company, or whole partners of the Greenock bank; yet there was a distinction as to Mr. Gammell, who appeared to be apprized of the transaction, and approved of it.

The appellants reclaimed, and prayed to alter, or to allow evidence to be given in upon a variety of points. And the proof asked being allowed, the Court finally pronounced this interlocutor:—“ The Lords having advised this petition, Jan. 19, 1796.
 “ and additional petition, with the answers thereto, and
 “ proof adduced, they adhere to the former interlocutor
 “ reclaimed against.”

Against these interlocutors the Royal Bank brought the present appeal to the House of Lords.

Pleaded for the Appellants.—The debt is proved to have arisen from the value of the notes issued by the respondents as a banking Company, and which the appellants, for their accommodation, took from the public as payments in money; the respondents were therefore bound in law and in justice, and in fair dealing, to retire these notes from the appellants, so as no loss might arise to them from the outlay and want of interest, or in any other shape. To accomplish this, they by the letter from their cashier, of the 28th July 1785, accredited Mr. Dunlop, one of their own number, with general and unlimited powers, to exchange or retire these notes. The notes having accordingly been delivered over by the appellants to Mr. Dunlop, it is for the respondents to show, either that value was given for them, or that, in delivering them to Mr. Dunlop, the appellants expressly and unequi-

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vocally renounced the security of the respondents as a Company, and made a loan thereof to Mr. Dunlop, as an individual. This is the plain and true shape of the present question, and not whether Mr. Dunlop, by the arrangement in Jan. 1793, created a new obligation upon the Company, which did not previously exist. There was not, nor could be, occasion for any such new obligation. The Company were bound, in every sense, for the value of their notes; and when they referred to Mr. Dunlop, as the person who was authorised to take them up, all that was incumbent on the appellants, in order to preserve that obligation entire, was to fix and ascertain, in an explicit manner, the delivery to Mr. Dunlop, as acting under that authority, and to this only effect, and to indemnify the appellants of interest, was the arrangement in question. The terms of the interchanged missives on that occasion prove this. Mr. Dunlop, *as agent for the Company* there, says:—" *I shall, three times in the week, take up such of the notes of the Greenock Company as may come into your hands, by giving you what Royal Bank notes I may have, and an order on my account for the balance; and I shall make payment on said account, on your receipt, in the manner most convenient for myself, either by notes of other Banking companies' bills in Edinburgh or London, &c. The accounts shall be settled once a year, or oftener, if either party requires it.*" The respondents have attempted to assimilate this to a common cash credit to Mr. Dunlop, and with those ignorant of the nature of bank transactions, they might be listened to, as the operations that were to follow were, no doubt, to be all in cash; and Mr. Dunlop was to get the command of all the Company's notes. But could the respondents hold such language to a banker? Would they be hearkened to one moment, in saying that an account, in which nothing was to pass but the amount of their notes, delivered to their partner or agent, was of the nature of an ordinary cash credit? Or is it fit for belief, that a national bank, whose great advantage is the issuing and circulation of their own notes, would give a 'cash credit to an individual, and make the whole advances upon it in the notes of a private provincial company, in order that they might be thrown into the cricle? There is no countenance for such a proposition, either in law or principle. 2d. The arrangement in question, and the operations consequent thereon, were for the benefit and ad-

vantage of the Greenock Bank, and *in rem versam* of the respondents. This is made evident from the letters and other evidence in the cause. In particular, Mr. Dunlop, in his letter of 5th Jan. 1793, to Mr. Gammell, writes:—"The Royal Bank have been complaining very much," and informs him of the arrangement made for the benefit of the bank. In answer, Mr. Gammell writes:—"I am glad you have settled matters amicably with Mr. Scott Moncrieff, and that upon such a plan as will prevent our notes from going to Edinburgh, which was troublesome to all parties." Other letters were also written to the same effect.

Hence it was clear that this arrangement had a twofold object, 1st. To prevent the Greenock Company's notes being refused at the Royal Bank office, or sent down from thence to Greenock for payment; and, 2d. To prevent those notes from going to Edinburgh, which occasioned great expense and trouble to the Greenock Company. All these objects were completely and effectually accomplished by the arrangement gone into. 3d. And even though this arrangement of January 1793 were to be held a new obligation come under by Dunlop, and that loss had arisen upon it to his Company, yet the respondents must be liable to make it good; because Dunlop had the sole direction and management of this branch of the extensive banking business in Glasgow, and, in particular, he had been publicly announced by the letter of 28th July 1785, to the appellants, as entrusted with the exchange or retirement of their notes. His powers, therefore, to bind the Company in any transaction relating to the concerns confided to his management were inherent and indispensable, and he accordingly did pledge the security of the Company, in the transaction in question.

Pleaded for the Respondents.—If the present case admitted of the general question, "How far James Dunlop, as a partner of the Greenock Banking Company, had power to bind the Company?" it would be matter of no great difficulty to show that he could not, as such, have affected the Company by the agreement or transaction in question. It is true that a partner, who is seen publicly and generally to act in that character, may by transactions *in the common and ordinary course of their business*, and signing the firm of their company, bind the partnership to those who have so transacted with him, to any extent, and without any regard to all private and secret articles of agreement among the

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several partners themselves, not known to those with whom such partner has so transacted. And the reason is plain. All the partners, in such a case, give a general credit to each individual partner, for the purpose of carrying on the ordinary course of business, and their contract, or articles of copartnership, can only operate as private regulations for the adjustment of their own separate interests. But the very reverse of all this is the case at present. The Greenock Banking Company did not carry out their business upon private articles of partnership. They were published in newspapers, and notice thereby given that the business they were to carry on was that of bankers, and that in the course of that business the firm of the Company was to be signed by "James Miller, their cashier." Nor is it pretended by the appellants that this had never come to their knowledge. The Royal Bank cannot well maintain that they are ignorant of the business of banking, or of the usage or manner according to which such business is carried on by banking companies. Neither will they say that the public notice which had been given as above never came to their knowledge. They knew that Greenock was the seat of the Greenock Banking Company—that *there* contracts and agreements affecting the general business of this company were to be settled and concluded; that *there* only the firm of the house could be signed; and that the firm, under the signature of the cashier, was essential to the binding force of every instrument for carrying such contracts or agreements into execution. Besides, they knew that Mr. Gammell, residing at Greenock, was the active partner, and that Mr. Dunlop, who was the *mere agent* of the branch in Glasgow, had no general powers; and his acting as special agent did not entitle him, without special powers, to enter into any transactions. 2. But further, the appellants transacted with Mr. Dunlop, not merely as agent, but as a special agent, accredited to them as such by an express commission in writing, defining the precise powers and purposes of his agency, and as such received and expressly acknowledged by the appellants. This letter was dated from Greenock, under the hands of Miller the cashier, and was agreeably to the articles of partnership, and the public notice they had given. The first agreement was that of mere exchange of notes of the bank, and was a transaction strictly between the Greenock Bank on the one hand and the Royal Bank on the other. But this was changed into one

of a very different nature by their agent. It was a credit opened by him, although he was a mere agent, with restricted and special powers. He had no power or authority from the bank to enter into such an obligation. In short, it was understood by the Royal Bank themselves, that the Greenock Bank was not to be bound. They deal with Dunlop alone, and they consent to take an obligation, signed by himself, and which they must have known did not and could not bind the bank. And Dunlop himself gave good reason for the appellants to understand that he never meant to bind the Greenock Bank at all by the alteration of the letter written and signed by him. Indeed, from his capacity of agent merely, it must have been understood by all that he, as agent, could not bind the Greenock Bank without having express and special powers so to do.

After heaving counsel,

LORD CHANCELLOR LOUGHBOROUGH said,—

“ My LORDS,

“ Though I concur in this case with the judgment given by the Court of Session, I think it proper to state the ground upon which my opinion is formed, lest an idea should be entertained that we went upon this reason, that a partner, in circumstances similar to those in the present case, could not by his own transaction bind the partnership. It is not upon that ground that I have formed my opinion.

“ It is founded upon this, that from the written document, which is the basis of the transaction now in question, the letter of the 1st of January 1793, it would be impossible in this country to raise a cause of action against the respondents in this matter. The whole of the difficulty in the present case lies upon the evidence in the cause—the letter of Mr. Scott Moncrieff and Mr. Simpson ; though these were not evidence of themselves, they were made so by the parties. Nothing positive with regard to the transaction appears from Dunlop’s letters ; but, on the other hand, we have his deposition after his bankruptcy, that this was a private transaction of his own, and all the entries in his books state it as his own private account.

“ This is a case in which I have changed my opinion more than once or twice. There appears to me to be nothing in the cause to fix upon Mr. Gammell in the smallest degree—the double part which Dunlop appears to have acted. The other partners were inactive. I am sorry for the manner in which Mr. Scott Moncrieff appears in the business, as, from the character given of him, he is a man of respectability and integrity ; but too much confidence was reposed in the supposed responsibility of Dunlop. It is

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not unlikely that Dunlop saw the error into which Scott Moncrieff was falling, for the latter makes no difficulty in accepting the draft which had been so much, and so materially altered by Dunlop, and sees no difference between the two papers, calling them trifling alterations.

Kenyon.

“ Under the circumstances of the 'present case, I thought it proper not to rest upon my own opinion alone. I would willingly have rested on the opinion of those whom I respected, had that opinion been uniform on either side. I requested the assistance of a noble *Lord* now near me, and after reading the case, his Lordship formed an opinion different from what I have now given ; he, however, now concurs with me in opinion to affirm the judgment of the Court of Session.

Supposed to
be Butler and
Laurence.

“ *Two judges* also, of much acuteness, and great experience in such questions, were applied to ; they differed in opinion, and after having had a conference together on the subject, they parted still holding different opinions.

“ Under all the circumstances of this case, I think the judgment of the Court of Session is not founded on error, and ought to be affirmed. The decision of your Lordships, if in this way, will also have a good effect. It will give a lesson to the Royal Bank to be more circumspect, and to pay a greater attention to accuracy in their future transactions.”

Accordingly it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Sir John Scott, Ro. Dundas, W. Grant.*

For Respondents, *Robert Dallas, Wm. Tait.*

THOMAS SMART, Mason in Dundee, *Appellant ;*
The MAGISTRATES and TOWN COUNCIL of }
Dundee, - - - - - } *Respondents.*

House of Lords, 22d Nov. 1797.

PROPERTY—ACCESSION—SEA SHORE—BURGH.—A proprietor of a tenement within burgh, whose property is bounded by the sea flood, cannot acquire the vacant space of ground left by the sea, be-