result of agreement, it would be hard to dismiss this appeal with costs, by reason of our being incompetent to deal with matters which both parties seem to have supposed that we should be competent to deal with. Therefore I approve entirely of the motion proposed by my noble and learned friend to be submitted to your Lordships, that the last interlocutors should be affirmed, and petition of appeal dismissed, without costs.

LORD CHANCELLOR.—That the interlocutors of the 21st of May 1862, the 6th of June 1862, and the 28th of February 1863, be reversed, and the appeal dismissed without costs.

LORD WESTBURY.—Would your Lordships allow me to suggest, that our intention is to affirm those interlocutors which discharge the minute and grant the absolvitor; but inasmuch as it is not competent to the House to entertain the appeal upon the first interlocutors, I would, therefore, with submission to your Lordships, suggest, that your Lordships should dismiss, without costs, the appeal as to all the interlocutors except the interlocutors discharging the minute and granting the absolvitors; but affirm those last interlocutors, the appeal, in respect of those interlocutors, also being dismissed without costs.

LORD CRANWORTH.—I think that would be very much the effect of the question as it was put by my noble and learned friend on the woolsack. The principle is, that we do not affirm those interlocutors which we think were grounded upon the original interlocutor of December 1854, which took the case out of the common *cursus curiæ*. We do not reverse them, and we do not affirm them; we are not competent to deal with them.

LORD WESTBURY.—Those interlocutors were emanations from the consent of the parties, and from the consent of the parties alone can they derive any authority. Therefore they are not affirmed.

LORD CHANCELLOR.—I believe the result of the way in which I put the question to the House is precisely what your Lordships have suggested, namely, that we take no notice at all of those interlocutors upon which the appeal is not competent, but with regard to the other interlocutors, we affirm them and dismiss the appeal without costs in respect of the whole.

Appeal dismissed without costs as to the first interlocutors; last two interlocutors affirmed without costs.

Appellants' Agents, Wotherspoon and Mack, S.S.C.; Simson and Wakeford, Westminster.—*Respondents' Agents*, Webster and Sprott, S.S.C.; William Robertson, Westminster.

JULY 13, 1866.

JOHN BICKET, *Appellant*, *v.* JAMES MORRIS and Wife, *Respondents.*

Water—Riparian owner—Right to build *in alveo*—Encroachment—Action—Actual damage—*Though a riparian owner on a stream not navigable is the sole owner of half of the* alveus ad medium filum, *still he cannot exercise one of the rights of absolute ownership, viz. building on such* alveus. *And an adjacent or* ex adverso *riparian owner is entitled to prevent his doing so even though such building would not cause or be likely to cause any actual damage to such owner, for such building necessarily tends to a diversion of the current.*

Process—Appeal—Jury Trial—Enumerated Cases—*An action against a riparian owner for building on the* alveus *of a stream is not an action for injury to land in which "title" comes in question, and therefore is one of the enumerated causes within* 6 *Geo.* IV. *c.* 120, § 28.

Appeal—Competency—Waiving objection—*Though an appeal is incompetent, a party may be barred from taking the objection, as by having himself already appealed to the Inner House from the interlocutor which he says was not appealable.*[1]

The appellant Bicket was the owner of house property abutting on the Water of Kilmarnock in the town of Kilmarnock. At that place the river was not navigable, was about fifty-eight feet wide, and very shallow. Bicket resolved in 1860 to rebuild his premises, and he was desirous of building his wall on the river side farther into the river. He applied to his neighbour Mr. Morris, the owner of premises directly opposite, on the other bank of the river, for permission to build the new wall according to a red line drawn on the Ordnance map, and it

[1] See previous report 2 Macph. 1082: 36 Sc. Jur. 529. S. C. L. R. 1 Sc. Ap. 77: 4 Macph. H. L. 44; 38 Sc. Jur. 547.

was finally agreed, that, in consideration of receiving £10 from Bicket, he (Mr. Morris) would make no objection to the wall being built farther into the river. The parties signed a copy of the map as relative to their agreement, and the money was paid.

After the building had proceeded, the respondent discovered, that Bicket, instead of adhering to the red line agreed upon, advanced his wall still farther into the river by a distance of three feet at one place. The respondent complained, and requested the appellant to desist, but he refused, as he contended that he had kept to the line agreed on. The respondent thereupon applied for a suspension and interdict, and also commenced an action of declarator. He did not allege any actual damage from the appellant's operations, but alleged such operations were injurious, inasmuch as they had the effect of narrowing the channel, altering the flow of the river, and diverting the course of the stream. The respondent concluded, that the appellant had no right to build on the *solum* of the river, and that he should be ordained to take down his building so far as it transgressed the red line agreed on between the parties.

The appellant denied, that he had transgressed the red line; but even if he had done so, he alleged, that no injury was caused to the respondent.

The evidence produced was conflicting. The court of Session held, (1.) that the appellant had in point of fact encroached; (2.) that he was liable to an action for such encroachment, though no injury was alleged by the respondent.

The defender (Bicket) appealed against the interlocutors, and stated in his *printed case* the following reasons:—1. Because upon a fair and sound construction of the agreement between the parties, the appellant was entitled to erect the river wall of his new premises in the position in which it has been built. 2. Because the buildings erected by the appellant do not extend farther into the channel of the stream than the line indicated by the red line drawn upon the duplicate copies of the Ordnance survey map. 3. Because the respondents have no interest to insist in the removal of the said buildings inasmuch as they have been erected by the appellant upon his own property, and do not in any way injure or threaten to injure the property of the respondents. 4. Because the said buildings were commenced, carried on, and completed by the appellant with the knowledge of the respondents, and without objection on their part, and they are therefore barred from insisting on the removal of the same. 5. Because the action of suspension and interdict was not raised till after the buildings complained of had been erected by the appellant.

The respondent in his *printed case* submitted, that the appeal should be dismissed, for the following reasons:—1. On the competency. The appeal is incompetent, in respect, that although the actions in which the interlocutors appealed from were announced were actions on account of injury to land where the title is not in question, and therefore of the class of causes appropriated to trial by jury under the Judicature Act, 6 Geo. IV. c. 120, § 28, the parties of consent took the proof therein by commission, and upon the proof so taken obtained the decision of the Court of Session not in the course of the ordinary jurisdiction of the Court, but judging of consent of parties. 2. On the merits. The evidence shews, that the appellant has advanced his buildings into the *alveus* of the river beyond the line agreed on between him and the respondents. 3. The encroachment by the appellant's buildings upon the *alveus* of the stream opposite the respondents' property not being warranted by the respondents' consent, nor justified by the contract between the parties, is in contravention of the respondents' rights as opposite proprietors.

Rolt Q.C., *Anderson* Q.C., and *Blair*, for the appellant.—This appeal is competent. It is true the parties by consent took a proof by commission, but this it was competent to do, because it was not one of the enumerated cases which must be tried by a jury—6 Geo. IV. c. 120, § 28. But even if it were, the Court has power judicially to take proof by commission, for this is not an action for damages, but it is an action involving title to land—*Crawford* v. *Dixon*, 2 W. S. 354; *Dixon* v. *Bovill*, 3 Macq. App. 1; *ante*, p. 663; *Mag. of Rothesay* v. *McKechnie*, 4 Macph. 214; 13 and 14 Vict. c. 36, § 49. If it be held, that the present case comes within the principle of *Craig* v *Duffus*, 6 Bell, Ap. 308; *Dudgeon* v. *Thompson*, 1 Macq. App. 714; *ante*, p. 403; *Mag. of Renfrew* v. *Hoby*, 2 Macq. App. 478; *ante*, p. 627; so as to have become in effect an arbitration in consequence of the taking of proof by commission, then the point of departure was when the Lord Ordinary gave his judgment, and no appeal to the Inner House would have been competent. At all events, the respondent cannot be heard to take this objection after having himself appealed to the Inner House.

As to the merits of the case, the appellant in building on his own half of the *alveus* was only exercising one of the ordinary rights of property, and he was entitled to build as he pleased so long as he caused no damage to his neighbour. It is essential to the maintenance of such an action, that actual injury has been done, for if no injury, then *damnum absque injuriâ* is no cause of action. Riparian owners on opposite sides are not joint proprietors of the joint channel, but each is sole proprietor of his own half of the *alveus*—*Wishart* v. *Wyllie*, 1 Macq. App. 389. Each riparian owner has merely a common interest but not a common property in the stream—Bell's Pr. § 1086. It is well established, that in cases of common interest there can

be no right of one to object to what is done by another on his own property, unless actual injury accrues—*Menzies* v. *Breadalbane*, 3 W. S. 235. There is nothing inconsistent with that rule in *Mag. of Aberdeen* v. *Menzies*, M. 12787; *Farquharson* v. *Farquharson*, M. 12779. The interlocutor of the Court is therefore wrong which says "the erection has the effect of diverting to a certain extent the flow of the water, and is therefore an illegal encroachment on the right of the pursuer," for it contains a *non sequitur*. It is only where actual damage is caused, that there is an illegal encroachment. Moreover, the respondent cannot complain after acquiescing in the appellant's acts. He who stands by and sees a stranger dealing with his property and does not object, cannot be heard afterwards to complain—*Shand* v. *Henderson*, 2 Dow, 519; *Ayton* v. *Melville*, M. "Prop. No. 6;" *Marquis of Abercorn* v. *Langmuir*, 20th May 1820, F. C.; *Stirling* v. *Haldane*, 8 S. 131; *Cairncross* v. *Lorimer*, 3 Macq. App. 827; *ante*, p. 984. As to the suspension and interdict, that action was too late after the building had been completed—*Provost of Glasgow* v. *Abbey*, 4 S. 266; *Dick* v. *Thom*, 8 S. 232; *Mackintosh* v. *Robertson*, 9 S. 75.

The Attorney General (Palmer), and *W. Paterson*, for the respondent.—This appeal is not competent, because this is substantially an action for injury to land where title is not in question, and therefore was appropriated for jury trial. As the parties, therefore, took the cause out of the ordinary course, they cannot appeal against the judgment—*Craig* v. *Duffus*, 6 Bell, 308; *Dudgeon* v. *Thomson*, 1 Macq. App. 714; *ante*, p. 403; *Mag. of Renfrew* v. *Hoby*, 2 Macq. App. 478; *ante*, p. 627. As to the merits, the appellant had no right to build on the *alveus* of the river, even though his doing so cause no actual injury to the respondent. The very act of so encroaching on the *alveus*, in which all the riparian owners have a common interest, of itself imports damage, and none need be alleged in order to maintain the action. The very act of building must always tend more or less directly and immediately to divert the current, and that is illegal—*Mag. of Aberdeen* v. *Menzies*, M. 12787; *Farquharson*, M. 12779; *Menzies* v. *Breadalbane*, 3 W. S. 235. It ought not to be a burden thrown upon the pursuer in such cases to prove how the encroachment will ultimately affect him. There is no ground for the defence of acquiescence set up by the appellant.

Cur. adv. vult.

LORD CHANCELLOR CHELMSFORD.—My Lords, the first question to be considered is the competency of the present appeal. It appears to me, that this is one of the actions "appropriated to the Jury Court," under the 28th section of the Scotch Judicature Act, 6th Geo. IV. chap. 120, being an action on account of an injury to land in which the title was not in question. By the word "title" I do not understand to be meant the right to do the act which occasioned the injury, but the title to the land itself to which the injury is alleged to be done.

In this case the complaint is, that the defender encroached by building beyond a certain line upon the *solum* of the river called the Water of Kilmarnock, opposite the pursuer's property. It is in respect of his property in the land, that the pursuer disputes the right of the defender to encroach upon the river, but the title to the land affected by the encroachment is not at all in question. It was contended by the appellants, that there being no claim for damages in the pursuer's summons, it was a case not within the 28th section of the Judicature Act; but it seems to me, that this section is not confined to cases where damages are demanded, but that it extends to all the enumerated causes of action where a question of fact is to be tried proper for the determination of a jury. The cause ought, therefore, in regular course, to have been remitted to the Jury Court, and the Lord Ordinary had no authority to order the proof to be taken by commission.

But it was quite competent to the parties to agree, that the proof should be taken by commission instead of by a jury, and this having been done, the question arises, whether the cause was not removed from the regular course of proceeding, so that it could no longer be regarded as a trial *in curiâ*, and subject to appeal.

It is unnecessary to consider the 49th section of the 13th and 14th Victoria, chap. 36, allowing the Lord Ordinary to take evidence by commission in causes not especially enumerated in the 6th Geo. IV. as appropriated to be tried by jury, because I have already expressed my opinion, that the present cause is one of those enumerated in that Act. Whether, after having consented to the proof being taken by commission and reported to the Lord Ordinary for his decision, the parties had precluded themselves from presenting a reclaiming note to the Inner House, is a question which it appears to me to be unnecessary to decide. The pursuer having failed before the Lord Ordinary, himself carried the cause into the Inner House by reclaiming note, thereby asserting his right to appeal from the Lord Ordinary's interlocutor. Having obtained from the Court of Session an interlocutor reversing the interlocutor of the Lord Ordinary, it would be opposed to every notion of propriety and justice if the pursuer could successfully resist the defender's right to question the interlocutor upon the ground of incompetency. By taking the step of appealing to the Inner House, the pursuer, in my opinion, has precluded himself from

objecting, that the interlocutor pronounced in his favour is not subject to all the consequences of other interlocutors, and therefore appealable to this House.

The next question to be determined is one of fact, namely, whether the appellant has extended his buildings beyond the line permitted by the agreement. Upon this subject the evidence is conflicting and impossible to be reconciled. The whole difference between the parties depends upon the fact, whether the letter D on the plan given in evidence accurately represents the junction between the new wall and the old. If it does, then the new wall is properly represented by the blue line, and there has been an encroachment beyond the agreed limit. If, on the contrary, the letter C on the red line is the point at which the new wall strikes the old, then the defender is within the limit prescribed by the agreement. Both parties agree, that for a certain part of the new building the foundation of the old wall has been used. This being so, and the building running in a straight line throughout its length, I do not well see how any other than the blue line can be taken to represent the extent of the encroachment. The Judges of the Second Division have come to this conclusion; and even if I were disposed to form a different opinion from them, I should be very unwilling to overrule their judgment upon a question of fact of so doubtful a nature. I therefore assume as an established fact, that the appellant has exceeded the limit conceded to him by the agreement.

The important question in the case is, whether the respondents were entitled to a declaration, that the defender had no right or title to erect any building, or otherwise to encroach upon or to interfere with that part of the *solum* of the river called the Water of Kilmarnock, which is immediately opposite the pursuer's property, beyond a certain line, and to a decree ordering the defender to take down and remove the buildings or other erections, in so far as these extend into or encroach upon the *solum* of the river beyond the said line, and interdicting him from erecting "any building or otherwise encroaching upon the *solum* of the river beyond the line in question."

There is a general statement in the pleas in law of the encroachments complained of being "injurious to the pursuer's property," but no proof was given by him of any actual injury from the building being advanced farther into the river than the line agreed upon. The result of the opinions of the Judges of the Second Division appears to be, that a riparian proprietor has no right to erect any building *in alveo fluminis*, and that if he does so, although the opposite proprietor may be unable to prove, that any damage has actually happened to him by the erection, yet, if the encroachment is not of a slight and trivial but of a substantial description, it must always involve some risk of injury. Lord Benholme said, "Without my consent" (*i.e.*, the consent of the proprietor of the other side of the river) "you are not to put up your building in the channel of the river, for that in some degree must affect the natural flow of the water. What may be the result no human being with certainty knows, but it is my right to prevent your doing it, and when you do it, you do me an injury whether I can prove damage or not." And Lord Neaves said: "Neither can any of the proprietors occupy the *alveus* with solid erections without the consent of the others, because he thereby affects the course of the whole stream. The idea of compelling a party to define how it will operate upon him, or what damage or injury it will produce, is out of the question."

These views appear to me to be perfectly sound in principle, and to be supported by authority. The proprietors upon the opposite banks of a river have a common interest in the stream, and although each has a property in the *alveus* from his own side to the *medium filum fluminis*, neither is entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water. My noble and learned friend, the late LORD CHANCELLOR, during the argument put this question, "If a riparian proprietor has a right to build upon the stream, how far can this right be supposed to extend? Certainly, he added, not *ad medium filum*, for if so, the opposite proprietor must have a legal right to build to the same extent from his side." It seems to be clear, that neither proprietor can have any right to abridge the width of the stream, or to interfere with its regular course, but anything done *in alveo* which produces no sensible effect upon the stream is allowable.

It was asked by the counsel in argument, whether a proprietor on the banks of a river might not build a boathouse upon it? Undoubtedly this would be a perfectly fair use of his rights, provided he did not thereby obstruct the river or divert its course; but if the erection produced this effect, the answer would be, that, essential as it might be to his full enjoyment of the use of the river, it could not be permitted; *à fortiori*, when the act done is the advancing solid buildings into the stream, not in any way for the use of it, but merely for the enlargement of the riparian proprietor's premises, it must be an infringement upon the right and interest of the proprietor on the opposite bank. Upon principle, then, the pursuer had a cause of action in respect of the defender's building, and was entitled to a declaration against the encroachment and a decree to have the obstruction removed. The authorities cited in the argument at the bar support the principle, and establish a satisfactory distinction. The proprietors on the banks of a river are entitled to protect their property from the invasion of the water by building a bulwark,

ripam muniendi causâ; but even in this necessary defence of themselves, they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite side of the river. In this case mere apprehension of danger will not be sufficient to found a complaint of the acts done by the opposite proprietor, because, being on the party's ground, they were lawful in themselves, and only became unlawful in their consequences upon the principle of *sic utere tuo ut alienum non lædas.* But any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor, and therefore the act being *primâ facie* an encroachment, the onus seems properly to be cast upon the party doing it to shew, that it is not an injurious obstruction.

There only remains the question of acquiesence to be considered. There is no doubt as to the principle of the cases of persons standing by and permitting acts to be done which they are entitled to prevent. It is only just, that a person who has been encouraged to continue expensive operations by the seeming consent of him who might have stopped them, should be able to defend himself against any subsequent attempt to treat them as an encroachment upon the rights of the party who has so misled the other into the confidence, that his acts were sanctioned. But in all such cases knowledge of the acts done is essential to stop the party who has suffered the encroachment upon his rights from afterwards objecting to it. In this case there was an agreement between the parties, and it does not appear, that the pursuer knew at first that the defender was exceeding the limits prescribed by the agreement. As soon as he was aware of the fact he objected to it. The defender, however, chose to go on in the face of the pursuer's objection. His proper course would have been to have suspended his works until it could be ascertained whether he had kept to the permitted line or not. If he determined to proceed, in spite of the objection, it is difficult to understand how he can now claim the benefit of the principle of acquiescence, or how he can reasonably complain, that he is compelled to reduce his building within the limits agreed upon.

My Lords, for these reasons I think, that the decree of the Second Division ought to be affirmed.

LORD CRANWORTH.—My Lords, there is no doubt, that the respondent agreed with the appellant, that to a certain extent he would not object to his advancing his building into the bed of the river, so that if the limit to which that agreement extended has not been transgressed, there can be no ground of complaint on the part of the respondent. If the limit has been transgressed, then there arises a second question, namely, whether independently of any agreement the appellant had not by the law of Scotland a right to erect the buildings which he has erected in the *alveus* of the river. In the hearing of this case at your Lordships' bar the two questions were argued in the order in which I have just stated them—that is, first, whether the appellant's buildings had been carried farther into the river than the line agreed to by the respondent; and secondly, whether by the law of Scotland there was anything to prevent the appellant, independently of consent, from erecting the buildings in question.

I will take a different course, and consider first what rights the appellant had independently of contract or consent.

By the law of Scotland, as by the law of England, when the lands of two conterminous proprietors are separated from each other by a running stream of water, each proprietor is *primâ facie* owner of the soil of the *alveus* or bed of the river, *ad medium filum aquæ.* The soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that, if from any cause the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the *alveus*, each of them up to what was the *medium filum aquæ*, in the same way as they were entitled to the adjoining land. The appellant contended, that, as a consequence of this right, every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the *alveus*, so long as other proprietors cannot shew, that damage is thereby occasioned or likely to be occasioned.

I do not think, that this is a true exposition of the law. Rivers are liable at times to swell enormously from sudden floods and rain, and in these cases there is danger to those who have buildings near the edge of the bank, and indeed to the owners of the banks generally, that serious damage may be occasioned to them. It is impossible to calculate or ascertain beforehand what may be the effect of erecting any building in the stream so as to divert or obstruct its natural course. If a building should be carried out to the middle of the stream, that is, to the whole extent of the proprietor's right in the *alveus*, no one can fail to see there might be great danger in case of floods. If the proprietor on one side can make an erection far into the stream, what is there to prevent his opposite neighbour from doing the same?

The most that can be said in favour of the appellant's argument is, that the question of the probabilities of damage is a question of degree, and so, if the building occupies only a very small portion of the *alveus*, the chance of damage is so little, that it may be disregarded. But this is an argument to which your Lordships cannot listen. Lord Benholme says truly, that what may be the result of any building in the *alveus*, no human being knows with certainty. The owners of the land on the banks are not bound to obtain or to be guided by the opinions of engineers or

other scientific persons, as to what is likely to be the consequence of any obstruction set up in waters in which they all have a common interest. There is in this case, and in all such cases there ever must be, a conflict of evidence as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testimony. They are allowed to say, "We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it." This is a plain, intelligible rule, easily understood and easily followed, and from which I think your Lordships ought not to allow any departure.

It was said in argument, "Then if I put a stake in the river, am I interfering with the rights of the riparian proprietors?" To this I should answer, *De minimis non curat prætor.* But further, it might be demonstrated in such a case, not that there was an extreme improbability, but that there was an impossibility of any damage resulting to any one from the act. It is, however, unnecessary for us to speculate on any such infinitesimal obstruction. No one can say, that in this case the extent to which the appellant has built into the river is so small as to be, like the case of a stake driven into the soil, inappreciable.

I will only add, that I find nothing in the cases or text books to which we were referred at variance with the view I have taken of the law. And the cases of the *Town of Aberdeen* v. *Menzies*, and *Farquharson* v. *Farquharson*, cited by the Lord Justice Clerk, are in exact conformity with it. I therefore come without hesitation to the conclusion, that the appellant had no right, independently of contract or consent, to build as he has built into the bed of the river.

That being so, the only other question is, whether what the appellant has done had been done with the sanction or acquiescence of the respondent. For if it has, then, whatever may be the rights of the other proprietors on the banks of the river, it does not lie in his mouth to complain. This is a mere question of fact, and must be decided by an examination of the evidence. I have given to the proofs on both sides my best attention, and the conclusion at which I have arrived is the same as that of my noble and learned friend on the woolsack.

The burden of proof was clearly on the appellant. He has erected a wall which *ex hypothesi* by the law of Scotland he was not justified in erecting. But then he says to the respondent—"You cannot be heard to complain of what I have done, for you agreed, that I should be at liberty to do it. You in substance sold to me your right to make the objections you are now making." The appellant, in order to sustain his case, must shew, first, what his agreement with the respondent was; and, secondly, that what he has done was warranted by that agreement.

As to the agreement itself, it is to be found in the letters that passed between the parties at the end of May 1861, from which it is plain, that in consideration of a sum of £10, the respondent agreed, so far as he was concerned, to permit the appellant to build his wall from the point marked A, to that marked C on the Ordnance map. This is confirmed by the evidence of Thomas Fulton, the appellant's agent, at p. 118. In fact the wall which has been built is a wall from the point A to the point D on that map. It was incumbent, therefore, on the appellant to shew, that the point C is a point on the line A D. It has never been contended, that the point C is a point further into the stream than the line A D; and if it is nearer the north bank than the line A D, it is certain, that in building along that line the appellant must have transgressed the limit for which he had contracted with the respondents.

Now, according to the map, the point C is considerably within the line A D. Mr. Gale says, that a perpendicular line drawn from that point to the line A D, measures two feet nine inches; and the area embraced by that line and the lines A C and C D amounts to 73 square feet. The appellant endeavours to meet this evidence, by shewing, that the Ordnance map is incorrect; that whereas the point C is there represented as nearer to Bank Street than the line A D, it ought to have been placed on that line; and in confirmation of this hypothesis he relies, amongst other things, on the testimony of workmen engaged in building the actual wall, who say, that when they came to the old wall which it is contended must be the point C, they continued to build on the line of the old foundations. And from this the inference is drawn, that the actual wall has not gone beyond the line stipulated for.

To this, however, there are two answers—first, even assuming, as I do, that the witnesses have no intention to deceive, yet looking to the nature of the buildings, and the great slope or battu in the walls which we are told existed, I cannot feel satisfied that the foundations, of which the witnesses speak, might not have been foundations of a wall sloping to the north east as described on the map. But further, it must be borne in mind, that the contract into which the respondent entered was a contract founded on the map—a contract, that the appellant might build on a line ascertained by the map. If the map does not accurately represent the old buildings as they actually existed, it might have been open to either party to contend, that the contract was not binding. But such an error cannot justify one of the contracting parties in saying to the other, "You have agreed to give me certain privileges up to a point in your property, as marked C on a map. I find the map is incorrect. The point C ought to have been differently placed; and I shall hold you bound to give me the privileges in question up to the point according to what the map ought to have been."

I am therefore of opinion with my noble and learned friend, that the appellant has failed to shew, that the respondent had bound himself not to object to the line of wall actually built.

With respect to the question raised by the appellant as to acquiescence, I have only to say, that I concur with my noble and learned friend on the woolsack. On the point of competency it is not necessary to give an opinion, as our decision is in favour of the respondents; but had this not been so, I should have been very slow to hold, that the pursuer, having himself presented a reclaiming note to the Inner House, and obtained the benefit there of a decision in his favour reversing that of the Lord Ordinary, can now say,—I will profit by that which is in substance an appeal to the Inner House, and treat that as a regular proceeding *in curiâ*, and yet hold, that an appeal from that decision is *ultra vires*. This question, however, as I have already stated, does not arise.

LORD WESTBURY.—My Lords, upon the question of competency, it must be understood, that the decision of your Lordships proceeds upon its being personally incompetent to the respondent to raise that objection.

This is a case of very considerable importance, because, as far as I know, it will be the first decision establishing the important principle, that a material encroachment upon the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor without the necessity of proving, either, that damage has been sustained, or that it is likely to be sustained, from that cause. The examination that has been given at the bar to the cases cited upon that point of law certainly had led me to the conclusion, that it has not yet been clearly established by decisions. I have felt much difficulty upon it, because undoubtedly a proposition of that nature is somewhat at variance with the principles and rules established on the subject by the civil law. I am, however, convinced, that the proposition as it has been laid down in the Court below, and as it has received the sanction of your Lordships in your judgments, is one that is founded in good sense, and ought to be established as matter of law.

When it is said, that proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not by any means follow, that the property is capable of being used in the ordinary way in which so much land uncovered by water might be used, but it must be used in such a manner as not to affect the interests of riparian proprietors in the stream. Now the interest of a riparian proprietor in the stream is not only to the extent of preventing its being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor.

If we attend to the subject for a moment, it will occur to every one, that in the bed of a river there may possibly be a difference in the level of the ground, which, as we know, has the effect of directing the tide or current of the river in a particular direction. Suppose the ordinary current flows in a manner which has created for itself, by attrition, a bay in a particular part of the bank; if that were obstructed by a building, the effect might be to alter the course of the current so as to direct the flow with a greater degree of violence upon the opposite bank, or upon some other portion of the same bank; and then it will immediately occur to your Lordships, that if, at that part of the bank to which the accelerated flow of the water in greater force is thus directed, there happens to be a building erected, the flow of the water thus produced by the artificial obstruction would have the effect possibly of wearing away the foundation of that building at some remote period, and would thereby be productive of very considerable damage.

It is wise, therefore, in a matter of that description, to lay down the general rule, that even though immediate damage cannot be alleged, even though the actual loss cannot be predicted, yet, if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury in the sense, that it is a matter the Court will take notice of as an encroachment which adjacent proprietors have a right to have removed. In this sense the maxim has been applied to the law of Scotland that *melior est conditio prohibentis*, namely, that where you have an interest in preserving a certain state of things in common with others, and one of the persons who have that interest in common with you desires to alter it, *melior est conditio prohibentis*, that is to say, you have a right to preserve the state of things unimpaired and unprejudiced in which you have that existing interest. Upon these grounds I entirely concur with your Lordships and with the Court below, in the conclusions at which you and they have arrived.

Upon the other part of the case, however, there is a matter which has given me very much anxiety, because I foresee, that it may, as between these parties, be the source of much future agitation. I agree with your Lordships, that it was incumbent on the appellant to prove, that what he has done fell within the limits of his agreement; and I also concur with your Lordships, that that obligation has not been discharged by him. Now we have arrived at that conclusion, as the Court below did, from the difficulty of ascertaining whether the buildings actually erected, do or do not coincide with the limit laid down in the plan to which the agreement between the parties refers. I observe, however, that the final interlocutor grants and makes perpetual an interdict, in conformity with the conclusion of the summons, which conclusion is in effect thus worded: "That the pursuer shall be entitled to have removed and to have in continuance

interdiction of so much of the building as transcends the red line." And accordingly the interdiction being thus granted on the application of that interdict, the same question which we have found is impossible to solve, will again recur.

It may be said, and perhaps truly said, that if that difficulty hereafter arises, it will be due entirely to either the misconduct of the present appellant, or to the inability of the present appellant to justify what he has done by proving, that it distinctly falls within the limits of the agreement; and I am compelled to accept that answer as a sufficient ground for acquiescing in the interlocutor. I trust, however, that the experience of the past will render the parties to the matter disposed to take some course consistent with reason and moderation on either side, and that they may prevent the further litigation which unquestionably is involved in granting an interdict of the description which I have mentioned, which involves an unknown quantity or at least a quantity of fact, that cannot at present be ascertained.

My Lords, with respect to acquiescence, undoubtedly the respondent had a right to assume, when the buildings were at first commenced, and during their prosecution, that they were constructed in conformity with the agreement; and we find, that when his attention was called to the fact, that the agreement had been violated, there was no delay on his part in remonstrating and protesting against what had been done. There has therefore been nothing like acquiescence which would debar him from the ordinary remedy.

My Lords, on these grounds, and at the same time regretting in some degree that we are obliged to deal with this case in a way which, if there be the same spirit of litigiousness as has hitherto prevailed, may possibly create further annoyance, I concur with your Lordships in thinking that, this interlocutor must be affirmed.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Appellant's Agents, Hunter, Blair, and Cowan, W.S.; Preston Karslake, Regent Street, London. —*Respondents' Agents*, Duncan and Dewar, W.S.; Loch and Maclaurin, Westminster.

FEBRUARY 11, 1867.

HER MAJESTY'S ADVOCATE FOR THE COMMISSIONERS OF WOODS AND FORESTS, *Appellant*, *v.* JAMES HUNT, Esq. of Pittencrieff, *Respondent*.

Prescription—Possession as Part and Pertinent—Royal Palace Ruins—*H. had been in undisturbed possession of the ruins of a royal palace for forty years and upwards. He had no express title, but alleged, that he had occupied the palace as part and pertinent of his barony of P., which was near, though not contiguous. In an action of declarator to establish the right of the Crown to the palace,*

HELD (reversing judgment), *That, inasmuch as other additions made to the barony during the previous two centuries were always specifically mentioned, but the palace was not, the reasonable presumption was, that the palace was not deemed to be a part and pertinent, though possessed by the owner of the barony; therefore, there being no basis on which the possession rested, H. proved no title against the Crown.*

OPINION—*Though a royal palace may be prescribed for against the Crown, yet it could not be held to pass as part and pertinent of a barony, if it had never been previously connected with the principal subject.*[1]

This was an action of declarator at the instance of the Lord Advocate against Mr. Hunt of Pittencrieff to have it declared, that the defender had no legal right or title to the royal palace of Dunfermline, or the ruins thereof, or the ground whereon the same is situated, and that he had no right or title to certain other pieces of ground adjoining; but that such palace and other buildings belonged to the Crown, and as such fell under the management of the Commissioners of Woods and Forests.

In the course of the action, the pursuer restricted his claim to the royal palace of Dunfermline, the ruins thereof, and ground immediately adjacent thereto.

The pursuer's pleas in law were as follows:—1. The defender having no right or title to any of the subjects mentioned in the record, and, more particularly, having no express conveyance

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[1] See previous report 3 Macph. 426; 37 Sc. Jur. 213. S. C. L. R. 1 Sc. Ap. 85; 5 Macph. H. L. 1; 39 Sc. Jur. 248.