not be dealt with other than in relation to the whole *res gestæ* and matters of fact, which appear from the record and proof, and to which the Lord Ordinary must therefore refer.

"In assessing the damages, in particular, the Lord Ordinary has felt much difficulty. But he has finally come to the conclusion that the sum he has fixed upon is not in any respect excessive, if he be otherwise right in his views."

The defender reclaimed.

MILLAR, Q.C., and ORR PATERSON for him.

PATTISON and STRACHAN in answer.

The majority of their Lordships held that the Lord Ordinary was right so far as regarded the first sum claimed, but held that the pursuer was not entitled to any damages for injury occasioned by the sequestration.

LORD NEAVES, who dissented, said—The action brought by the present pursuer is laid either on contract, *culpa*, or recompense. Anderson was the general agent for Kippen, but his power was limited to this extent that he could not alienate heritage. Then Duff, being tenant of these subjects under Kippen, while Anderson had the general management of them, Ross is introduced to Duff by Anderson, who gives him to understood that Duff is the proprietor. These two, Duff and Ross, then enter into a contract, but Kippen is no party to it. I do not think that a principal can be bound by misrepresentations made by his general agent unless a contract is entered into by the agent for the principal. Here a collateral contract between two other parties was induced by the false representations of the agent, and I do not think that the principal is liable in such a case. If this agent had made a contract for his principal, then the latter would be liable for the false representations of the former, but not otherwise.

With regard to *culpa*, in my opinion, if it can be shown that Kippen was enriched, then he may be liable to Ross for the extent to which he was *lucratus*. But in my opinion there is no evidence that he was *lucratus*.

I concur with your Lordship's decision with regard to the second part of the claim, viz., that for damages.

Agent for Pursuers—Andrew Beveridge, S.S.C.

Agents for Defender—J. & A. Peddie, W.S.

Saturday, January 14.

FIRST DIVISION.

MACBRAIR *v* SMALL.

Agent and Client — Expenses— Joint and Several Liability. In a case in which he had represented two different parties in a cause, whose interests were nearly identical, and whose defences were in general joint, but for whom it had been necessary occasionally to put in separate papers; the agent afterwards raised an action for his account of expense against one of the parties, but merely sued for his individual share, without raising any question of joint and several liability, on which footing he got decree. In his account, however, he charged the defender with the expense of all that was done separately in his individual name, and also with the whole expense of the joint proceedings. The auditor taxed off one-half of all these latter charges. *Held* that it was then too late to raise the question of joint and several liability, which should have been made the principal point in the case if it was to be brought up at all, and that the auditor had taxed the account upon the principle on which the action was brought.

Question—Whether the putting in of occasional separate pleadings would obviate the joint and several liability which would arise out of the otherwise joint conduct of a case.

This was the sequel of a case previously before the Court (*vide ante*, p. 141). The pursuer had obtained judgment in his favour, and been ordered to lodge his accounts with the auditor for taxation as between agent and client, before final decree was given for the amount.

The auditor taxed the account, and reported to the Lord Ordinary, who approved of the report, and decerned for the amount as taxed. The pursuer reclaimed, raising objections to the principle on which the auditor had proceeded.

GUTHRIE, for him, in support of the objections, referred to *Greenhill* v. *Gladstone*, 23 D. 1006; and *Mackenzie* v. *Cameron*, 15 D. 671.

STRACHAN, for the defender, was not called upon.

At advising—

LORD PRESIDENT—In the original action Mr Macbrair, the pursuer here, was very properly doing the work of agent for two different parties, for his clients had to a very great degree a common interest. But yet was it possible even in such a state of matters for him to charge the expenses of the separate defences and other papers put in for one of his clients against the other? However they may have been liable for such of the expenses as were joint, there is no doubt that each was solely liable for the expense of all pleadings lodged in his own name. This principle is acknowledged and applied by Mr Macbrair himself; and upon this footing his whole action is founded without there being a word said about joint liability. But whenever there is a slump sum charged for joint work, Mr Macbrair shifts his ground; he does not propose to separate the charges, but places them all to Mr Small's debit. Now this is perfectly inconsistent with the scope of the present action, and with the principle upon which Mr Macbrair has drawn his summons. I do not wish to say anything about joint and several liability, or upon the effect which the putting in of separate defences, &c., at certain stages of the action, may have had upon the question of joint and several liability; but this action was not brought upon the footing of joint and several liability at all. Mr Macbrair sues upon quite a different footing, upon the footing of individual liability, and upon that footing we have decided the question. We cannot now allow him to shift his ground, and bring up another and rather difficult and complex question, upon mere objections to the auditor's report, which we ordered by way of giving effect to our judgment. If he had wished to raise this question it should have been done as the principal point of the action. It is now too late.

The other Judges concurred.

The Court adhered.

Agent for Pursuer—D. J. Macbrair, S.S.C.

Agent for Defender—James Barclay, S.S.C.

Wednesday, January 18.

SECOND DIVISION.

PIRIE & SONS *v.* TOWN COUNCIL OF ABERDEEN.

Reparation — Damages—Fault — damnum fatale—*Property—Stream.* A stream flowing through a town, and used as a sewer, was covered over by a tunnel, at the mouth of which a grating was placed. In a flood of unprecedented violence this grating became choked up, and the stream overflowed and caused damage to buildings lower down the stream. *Held* that no responsibility attached to the upper heritor from the mere fact that his property had caused the injury, and that fault or negligence on his part was necessary to make him responsible for the damage.

The pursuers were proprietors of a block of ground and buildings in Aberdeen on the side of a small stream, the Denburn. On 16th October 1869, the Denburn overflowed and caused considerable damages to the pursuers' property, and they now sued the Magistrates and Town Council of Aberdeen, as representing the community, for £1350 as damages. The whole circumstances of the case are fully set out in the note appended to the following interlocutor and note of the Lord Ordinary (GIFFORD).

"Finds that the pursuers have failed to instruct that the loss and damage which the pursuers' property sustained by the flood or overflow of water on or about 16th October 1869 was occasioned, directly or indirectly, by the negligence or fault of the defenders, or by any causes for which the defenders are responsible; assolizies the defenders from the conclusions of the libel: Finds the pursuers liable in expenses, and remits.

"*Note.*—The Lord Ordinary has felt this case to be one of great nicety, and it is not without a good deal of hesitation that he has come to be of opinion that the pursuers have failed to instruct that the loss and damage which their property sustained by the flood or overflow of water on or about 16th October 1869 was caused, directly or indirectly, by the negligence or fault of the defenders. He does not think that the defenders are chargeable with any act, either of omission or commission, which can be said to have caused the injury complained of; and he is unable to find any other ground on which responsibility for the pursuers' losses can be fixed upon the defenders. In the Lord Ordinary's view the foundation of all actions like the present is *fault* or *negligence*—no responsibility arises against a proprietor from the mere fact that his property has caused injury to a neighbour if no fault or negligence is alleged or proved, mere *dominium per se* is not a ground on which damages can be awarded against a proprietor. No doubt, the possession of property involves various duties, and the neglect of these duties, or of any of them, may give rise to a claim of damages. Damages may also be due where the actual use of property occasions injury under the maxim *Sic utere tuo ut ulienum non lædas;* but in all cases, as it appears to the Lord Ordinary, there must be some fault, either of omission or commission, to found a claim of damages against a proprietor.

"This point was considered in the case of *Campbell* v. *Kennedy*, 25th November 1864, 3 Macph. 121; and the observations of the judges upon the case of *Cleghorn* v. *Taylor*, 27th February 1856, are extremely important. See also the various authorities quoted in *Campbell's* case, and in Addison on Wrongs, p. 346.

"While, however, in order to subject the defenders in damages, fault or negligence of some kind must be proved, such fault or negligence may in certain circumstances be very easily inferred. In particular, if it be shown that an injury by flooding has been sustained by a lower heritor, by reason of some structure erected, or operation performed on a stream by an upper heritor, there will be almost a presumption of fault against such upper heritor; and, at all events, the onus will lie upon him to show that the loss was occasioned by a *damnum fatale.* Proof of care in the construction or management of the works will not be sufficient to relieve the upper proprietor from responsibility. See this principle applied in the case of *Kerr* v. *Earl of Orkney*, 17th December 1857, 20 D. 298.

"The circumstances of the present case are very special, both in regard to the position and structure of the grating which caused the overflow, and in regard to the manner in which the grating and the channel of the Denburn above it was attended to and kept clear. The Lord Ordinary will very shortly notice the various points upon which the pursuers relied as establishing liability against the defenders.

"(1.) First, the pursuers maintained that the grating, the obstruction of which caused the overflow, was on the property of the defenders, and that this, *per se*, was sufficient to make the defenders in every way responsible therefor in reference to its structure, its maintenance, and its management.

"The whole of the grating, excepting about a foot on the left hand looking down the stream, is upon the property of the defenders. The mouth of the tunnel or culvert is also, with the exception of about a foot, on the defenders' property, but the tunnel then immediately enters the property of the Caledonian Railway, which is marked pink on the plan, and for a long way down the Denburn flows in the tunnel under the property of the railway company. It is apparent that the tunnel has been made, not for the use and benefit of the defenders, the town of Aberdeen, but for the use and benefit of the railway company, whose line and other works are constructed above the tunnel or culvert, and who at that place occupy the whole solum of the Denburn.

"Now, the eye or mouth of the tunnel or culvert, and the grating, which is a pertinent or accessory thereof, can hardly be separated in this question from the tunnel or culvert itself: and, although the strict boundary line cuts the grating and mouth of the tunnel obliquely, so as to leave an angle upon the property of the town, the Lord Ordinary has great difficulty in treating the town as an upper heritor, with the tunnel and its grating on their ground.

"The history of the construction of the tunnel and grating has been distinctly proved. The tunnel and grating were constructed, not by the town, but by the railway company. Originally it was intended that the solum above the culvert, or part thereof, should remain the property of the town; and it is shown by the towns-minutes that they exercised some control in reference to the structure and dimensions of the culvert. They were interested therein, not only as proprietors of the ground through which the culvert was to run, but in reference also to certain sluices and water