Interlocutor affirmed, and appeal dismissed with costs.

Appellant's Agents, Scott, Moncrieff, and Dalgety, W.S.; Connell and Hope, Westminster.—*Respondents' Agents*, T. Ranken, S.S.C.; Tatham and Proctor, Lincoln's Inn Fields, London.

JULY 13, 1866.

JAMES WHITE, Shoemaker, Aberdour, and Another, *Appellants*, *v.* The DUKE OF BUCCLEUCH and Others, *Respondents*.

Process—Issues—Consent to a Verdict—Applying Verdict—Highway—Res judicata—*In an action of declarator of right of way, this issue was adjusted: "Whether there existed a public right of way by or near the red line on the plan lodged in process," etc. The defender, before trial, gave in this minute: "The defender consents to a verdict for the pursuer on the issue."*

HELD, *The Court had no power thereafter to remit to a surveyor to lay out the road so consented to "in a route least burdensome to the defender;" therefore interlocutors pronounced on that basis were* ultra vires, *or if made with consent, were incapable of being appealed to the House of Lords, as being beyond the* cursus curiæ.

QUESTION, *Whether such an issue was not vitiated with an incurable uncertainty?*

Process—Abandonment of part of Action—Absolvitor—*W. in an action of declarator claimed five public roads, A B C D E. Before the record was closed, he gave in a minute abandoning C D E, but no expenses were paid, nor any interlocutor of the Lord Ordinary allowing the abandonment, nor were any issues adjusted as to these roads, though the roads A and B were ultimately established.*

HELD, *The Court was entitled to assoilzie the defender as to C D E, inasmuch as the abandonment had never been completed.*

HELD FURTHER, *That such absolvitor would not be* res judicata *as regards the roads C D E, for* ex facie *there was no adjudication of the subject matter of those roads.*[1]

The summons was raised in 1846. It was an action of declarator by Robert Hay and others, which was brought against the late Earl of Morton, to establish certain rights of way between Aberdour and Burntisland. The conclusions were applicable to five different paths—one from Aberdour harbour to Burntisland; another from Old Aberdour, joining the former road about half way between Aberdour and Burntisland; and the other three were paths in the neighbourhood of Aberdour joining one or other of the other two roads. The two roads first mentioned were described in the 1st and 4th articles of the condescendence, and the other three in the 2d, 3d, and 5th articles.

The summons, besides conclusions for declarator of right of way, contained the ordinary conclusions for removal of obstructions, and for interdict against the defender obstructing the pursuers in their right of way.

While the record was being made up, the pursuers (March 1851) abandoned the claims of rights of way in three of the articles of condescendence, but no interlocutor ever finally disposed of the minute of abandonment.

On 31st May 1851 the record was closed.

A great deal of procedure took place in regard to the adjustment of issues, which were frequently amended, and on other points; but in 1854 the issues were adjusted. The issues related to the two roads first mentioned, those described in the 1st and 4th articles of the revised condescendence; and no issues were asked in reference to the three other roads.

But before the case went to trial, the defender (8th December 1854) consented to judgment in the same way as if a verdict had been found for the pursuers on the issues; and the Court, on the defender's application, by interlocutor of 22d December 1854, remitted to Mr. Wylie, C.E., to prepare a plan, and lay off on the ground, and mark on the plan paths in accordance with the claim for rights of way in the issues.

Mr. Wylie returned a report, and made a plan; and the Court pronounced this interlocutor:—

"*22d November* 1856.—The Lords having considered the report by Mr. Wylie, No. 744 of process—In respect, that no objections have been stated thereto, approve of the said report and

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[1] See previous report 21 D. 1055; 24 D. 116; 1054. *Hay* v. *E. Morton*, 34 Sc. Jur. 61; 538; S. C. L. R. 1 Sc. Ap. 70: 4 Macph. H. L. 53; 38 Sc. Jur. 543.

relative plan, which has been subscribed by the President of this Division of the Court with reference hereto ; and, in terms thereof, and in respect of the minute for the defenders, No. 728 of process, Find the pursuers entitled to public footpaths through the defender's grounds between Aberdour and the Carron Company's ground at Starlyburn, in the lines and of the breadth fixed in the said report, and marked on the said plan by the line coloured with a light red colour; and decern."

No further steps were taken in the action till 28th June 1859, when, the defender having died, it was transferred against the present Earl of Morton and the trustees of the late Earl Duke of Buccleuch and others.

On 19th July 1861 the case was again put to the roll, on an application made to the Court in the process for removal of certain obstructions. It was then objected by the defenders, that two of the pursuers having died, the remaining pursuers had no title.

On that occasion the Court pronounced two interlocutors, the one on 21st November 1861, by which they "sustain the title of the remaining pursuers to insist in the conclusions of the summons hitherto undisposed of, but reserving, in the mean time, any questions as to the right or title of the remaining pursuers to insist for the expenses of process hitherto incurred."

And on 5th December 1861 they refused the motion, "in so far as the same relates to the conclusions of the summons for removal of obstructions."

The pursuers now moved for decree in terms of the conclusions for interdict, in reference to the two roads fixed by Mr. Wylie's plan and report, and by the interlocutor of 22d November 1856, and the Court disposed of that motion, and of the minute of abandonment, and of the expenses of process.

With regard to the minute of abandonment, the question arose, whether it was not incompetent, seeing it was professedly a minute of abandonment under the Judicature Act, and was lodged before the record was closed, whereas the Judicature Act and relative Act of Sederunt authorized abandonment of an action only after the record was closed.

The Court pronounced an interlocutor (21st May 1862) finding the minute incompetent, and appointing it to be withdrawn.

The pursuer then lodged the following minute :—"Fraser, for the pursuers, stated, that he abandoned the cause in so far as it related to the rights of way or footpaths described in articles 2d, 3d, and 5th of the adjusted revised condescendence, reserving the pursuers' right to bring a new action relative to the roads and portions of the cause thus abandoned, in terms of the Statute 6 Geo. IV. c. 120, and relative Act of Sederunt, without prejudice to the pursuers' right to proceed with the said cause as regarded the whole other matters and roads involved therein, as accords."

The defenders maintained—That the minute was still incompetent, because the Statute authorized only a total not a partial abandonment; besides, the whole cause had been disposed of under the issue; at all events the interlocutor pronounced in respect of the issue led by necessary inference to absolvitor from the conclusions of the summons referring to those rights of way not referred to in the issues.

The Court of Session held, that the action had been exhausted by the trial of the issues, and that there was nothing left to abandon and assoilzie the defender from the conclusions of the action, as to the right of way not put in issue.

The pursuers appealed against the interlocutors, beginning with that of 6th March 1855, made by the Court on advising Mr. Wylie's interim report, and in their *printed case* submitted, that the interlocutors ought to be reversed, for the following reasons :—1. Because the right of the pursuers to the footpath in the red line marked on the plan, No. 424 of process, was judicially established by the defenders' minutes of consent to a verdict and to a judgment as if a jury had returned a verdict for the pursuers on the issues, and the Court had no right or power afterwards to deprive the pursuers of the use of any portion of this footpath. 2. Because the *solum*, over which the right of way was established, was dedicated as a footpath to the public by the defender and his ancestors, and the defender had no right to interfere with that dedication or with the use and exercise by the public of this right of way so acquired by them. 3. Because the pursuers were entitled to enjoy the right of way established in favour of the public free from all interruption, and the Court ought not to have refused them an order or decree compelling the defenders to remove the obstructions which they had placed across the line of the footpath. 4. Because the pursuers were entitled to abandon the action in so far as it related to the footpaths described in the, 2d, 3d, and 5th articles of their condescendence, under reservation of a right to bring a new action, and they did regularly and competently abandon the same, with this reservation, by the minute of 7th March 1851. 5. Because, if the minute of 7th March 1851 had been irregular or incompetent by reason of its having been lodged before the record was closed, the minute of 26th May 1862, lodged after the record was closed, would have been regular and competent, and ought to have been sustained or given effect to. 6. Because the pursuers having succeeded in vindicating the public right of way resisted by the defenders ought to have been found entitled to their full expenses of process, and they ought not to be deprived of the expenses properly incurred by them subsequently to the 19th July 1861. 7. Because there were no grounds for a

modification of the expenses incurred previous to the said 19th July 1861, as these were taxed by the auditor, and the Court ought not to have reduced these taxed expenses from £880 13*s.* 10*d.* to £750.

The respondents in their *printed case* submitted, that there ought to be an affirmance of the interlocutors, for the following reasons :—1. Because the representatives of John Robertson and Robert Hay ought to have been made respondents in the appeal, at least in so far as the interlocutors appealed against relate to the expenses incurred in the Court below; and this not having been done, the appeal is irregular, defective, and incompetent, and cannot be insisted in or proceeded with by the appellants. 2. Because the appellants were not entitled to a footpath separate from the cart road between the points referred to in the fourth finding of the interlocutor first appealed against, their claim as set forth in the record being for a cart road, and they having acquiesced in an interlocutor directing the footpath to be laid off in the line least burdensome to the proprietor. 3. Because the appellants not having objected to Mr. Wylie's final plan, fixing the line of the footpath with the entrance thereto, but having allowed the Court below to pronounce the interlocutor, dated 22d, signed 29th November 1866, approving of said plan, without stating any objections, and having consented to and acquiesced in the said interlocutor, and used the path under it for a number of years without complaint, are now barred from challenging the said interlocutor, and the appeal, in so far as directed against it, is therefore incompetent. 4. Because, in the circumstances, the appellants were not entitled to demand the removal of the gates complained of by them, and because these gates are not obstructions to the use of the footpath. 5. Because it was incompetent for the appellants to abandon the action, in whole or in part, before the record was closed, and after the record was closed to abandon it in part. 6. Because the appellants were not entitled to abandon, either in whole or in part, after the cause had been exhausted by approval of the issues for trying the cause, and the procedure which followed thereon. 7. Because, in any event, the appellants were not entitled to any of the paths or roads originally claimed by them, with the exception of those which they put in issue, and their right to which was conceded by the late Lord Morton—at least, the said paths or roads having been so conceded, the appellants were not and are not entitled to any additional paths or roads. 8. Because it is incompetent, in the circumstances of the present case, to appeal on the question of costs, and the appellants are precluded from doing so by having accepted payment of the costs to which they were found entitled in the Court below. 9. Because the appellants were not entitled to costs, beyond the amount awarded to them by the Court below. 10. Because the interlocutors complained of are, in all respects, well founded.

Anderson Q.C., and *Wotherspoon*, for the appellants.—The interlocutors appealed from were wrong. The first interlocutor permitted a deviation in setting out the footpath, which was not in conformity with the consent to the verdict being given for the pursuer. The second interlocutor was wrong, because it attempted to take away part of the footpath dedicated to the public, and refused to order all obstructions to be removed—*Forbes* v. *Forbes*, 7 S. 441 ; *Thompson* v. *Murdoch*, 24 D. 975 ; *Wood* v. *Robertson*, 9th March 1809, F.C.; *James* v. *Hayward*, W. Jones, 222; *R.* v. *United Kingdom Electric Telegraph Co.*, 31 L.J.M.C. 166. The Court had no right to refuse to give effect to their minute of abandonment. At common law, irrespective of the Judicature Act 6 Geo. IV. c. 120, a pursuer had it in his power to abandon his action before the record was closed—*Caledonian Iron Co.* v. *Clyne*, 10 S. 133 ; but if the first minute of abandonment was irregular, the second was regular. It was therefore incompetent for the Court to assoilzie the defenders as regards the three roads abandoned, for to do so is to make the matter *res judicata* that no such road existed. It follows, that if the Court below was wrong as regards the abandonment, it was wrong also in reducing the taxed costs.

Rolt Q.C., and *Hall*, for the respondents.—This appeal is not competent. The parties chose to abandon the *cursus curiæ* at the stage, when they consented to take a verdict for the pursuer. [LORD CHANCELLOR.—We think it unnecessary to hear you, except on the point, whether the Court ought to have pronounced the interlocutor assoilzieing the defenders *quoad* the roads abandoned.]

It was not competent to the pursuers to abandon until the Court has pronounced an order of abandonment. It is a mistake to suppose, that at common law a party could abandon part of the claim—6 Geo. IV. c. 120, § 10. He can only do so after the record is closed; whereas here he did not do so, but went on and closed the record, without withdrawing the pleas in law as to the abandoned roads. It was therefore not only proper but necessary, that the Court should assoilzie as to the conclusions on which no issue had been taken and no proof offered. The interlocutor would not necessarily be *res judicata*, if another action were raised as to the roads abandoned.

Anderson replied.—It is preposterous to contend, that at common law a pursuer could not abandon the whole or part of his claim before closing the record—Shand's Practice, 344. It is competent either to restrict or abandon, and the latter was effectually done by the minute given in to the Lord Ordinary. The Court, therefore, had no right to assoilzie the defenders as to the parts of the action already abandoned.

LORD CHANCELLOR CHELMSFORD.—My Lords, this is the case of an appeal against six interlocutors of the Second Division of the Court of Session, and in the course of the argument your Lordships indicated a very strong opinion, that as to four of the interlocutors the appeal was incompetent. With the permission of your Lordships I will state the grounds upon which I conceive, that opinion is well founded. The summons of declarator claimed five several rights of public way, all of which, with the exception of one of them, it is unnecessary to specify. With respect to that one, a right of public footway was claimed from the old village to the harbour of Aberdour and to the burgh of Burntisland, leading from the South Street or Kirkwynd of the old village of Aberdour, and thence through several other places to the other terminus, past Starly Burn and Starly Burn Harbour to the kirk town of Burntisland, and from thence to the burgh of Burntisland as aforesaid.

On the 4th of March 1851 the pursuer as to three of those roads gave in a minute of abandonment, which will be the subject of future consideration, and the cause was therefore restricted to the remaining roads. Issues were adjusted, which appear to have been the subject of very considerable discussion, because Lord Cowan says, that there were no less than five editions successively proposed by the pursuer. Now it is most unfortunate, that after such anxious consideration and discussion as to the form of the issue, the only one of them, to which it is necessary to direct your Lordships' attention, should have been framed in the manner in which it has been.

The second issue is, "Whether for the said period of forty years or for time immemorial there existed a public right of way or branch foot road for foot passengers leading by or near the broad red line, as shewn on the plan No. 424 of process, from the Kirk Wynd of the old or easter village of Aberdour in a southerly direction along the eastern side of what is known as the Mill Meadow, to or near the Teinds Barns." I need not go further. It is only necessary to advert to that particular portion of the issue. That issue is framed in the alternative. Whether, if the cause had gone to trial, the jury would have been restricted to the exact terms of this issue, and must have found in these terms, or whether it would have been competent for the jury to determine, that the line of road was "by" the red line marked on the plan, or "near" the red line marked on that plan, in a particular direction, may be a question of doubt. But at all events it is unnecessary to determine that question, because the defender consented to a verdict in these terms—"The defender consents to a verdict for the pursuers on the issues in this cause." All the consent that was given by the defenders was, that "there existed a public right of way or branch foot road for foot passengers leading by or near the broad red line." Whether that road lay "by," or whether it lay "near" was left indeterminate, and it was difficult to say what was the proper course which the pursuer ought to have adopted under the circumstances.

A motion was made to the Court to apply that verdict. Now the only power the Court had, as it appears to me, in applying that verdict was to apply it in the terms to which the consent itself was applicable. If that left the matter uncertain, whether it was competent to the pursuer under the circumstances to have applied for a fresh issue by which the matter might have been precisely determined, or whether he might have had a new summons of declarator to ascertain whether the road was "by," or whether it was "near," and how "near" the red line, may also be matter of much doubt and difficulty. But at all events the duty of the Court in applying the verdict was clear and plain. It is just possible, that the Court might have had the power (I do not say, that they would have had the power) to refer it to Mr. Wylie, or some other person, to ascertain what was the line of public footway which the public had been accustomed to use for the last forty years. But the Court adopted a very different course, and did that which was most unquestionably *ultra vires*, for they pronounced this interlocutor. They "remit the case with the issues and minute consenting to judgment in terms thereof to Mr. W. J. Wylie, with directions to him to pay off and mark on the ground, and also on the plan prepared by him, the footpath so consented to, with the entrances to the same, in such manner and in such a line as to make the footpath least burdensome to the defender, and as to interfere as little as may be with the use and occupation of the ground by the defender, and at the same time so as fully to answer the right of a footpath between the places mentioned in the issue, and without interference with that right of way."

The Court, that is to say, the Second Division, had no power whatever to direct a road to be laid out equally convenient with that, to which the public were clearly entitled. They have adopted this course. They have not given the public any way which they had been accustomed to use; but they have consulted the convenience of the defender, and they have directed Mr. Wylie to ascertain a road which will be equally convenient to the public with that to which they were entitled, and not inconvenient to the defender.

There is no doubt whatever, therefore, that in this interlocutor, the Court having proceeded *ultra vires*, all the subsequent interlocutors which were founded on this as their basis were taken out of the judicial course, were no longer matter of judicial consideration, and consequently, that they were not a subject of appeal. Therefore the opinion which was expressed by your Lordships during the course of the argument must be perfectly well founded, that all those appeals must

be incompetent, which relate to the particular interlocutors which proceed on this interlocutor of the 22d December 1854, against which, as your Lordships will observe, there is no appeal at all. That interlocutor being consented to, all those appeals must be incompetent.

The only remaining question, therefore, relates to the two interlocutors which involve the question as to the minute of abandonment upon which undoubtedly there appeared to be some difficulty during the course of the argument, but it is one which, on consideration, it seems to me may be very easily determined. The minute, that was originally given in on the 4th March 1851, was in these terms:—"Deas, for the pursuers, stated, that he abandoned the cause in so far as it related to the rights of way or footpaths described in articles 2d, 3d, and 5th of the revised condescendence, reserving the pursuers' right to bring a new action relative to the roads and portions of the cause thus abandoned in terms of the Statute 6 Geo. IV. c. 120, and relative Act of Sederunt, without prejudice to the pursuers to proceed with the said cause as regarded the whole other matters and roads involved therein, as accords." Upon that there was an interlocutor by the Lord Ordinary of the 7th March 1851, in these terms:—"The Lord Ordinary having considered the minute by which the pursuers abandon this cause in part, appoints the defender to give in an account of expenses relative to the part of the cause now abandoned, and remits the account thereof, when lodged, to the auditor to tax the same and report, and *quoad ultra* continues the cause till to morrow."

Now it must be observed in passing, that that minute of abandonment was never perfected, because, according to the practice which is laid down in Mr. Shand's book (a book of authority) upon this interlocutor of the Lord Ordinary, there should have been a payment of the expenses which he directs to be ascertained; he refers to the auditor to tax the same and report. Those expenses should have been paid, and then the next step to be taken by the pursuer should have been to obtain an interlocutor of the Lord Ordinary, that, in respect the expenses due to the defender had been paid, allows the pursuer to abandon this cause, dismisses the action, and decerns, with the expense of extract. Nothing of that kind was done, and therefore, at the time of the closing of the record, which was on the 31st May 1851, there was no complete abandonment of these causes of action.

Then, in 1862, a new minute was given in, both of these minutes being dealt with, in the manner which I shall presently describe, by the Court. That minute, the date of which is the 26th of May 1862, is exactly in the terms of the former minute of 1851. Now it may be observed with regard to this minute, that it was only under the Statute of 6 Geo. IV., that such a minute could have been given in at that time when the record was closed; and the Statute of 6 Geo. IV. only gives power to a pursuer to abandon the whole cause of action. But this was an abandonment only of a part of the cause of action, and, therefore, on that ground, as it appears to me, it was incompetent.

But the Court dealt with both these minutes of abandonment. First of all, in a judgment of the 21st of May 1862. With regard to the first, the minute of 1851, the Lord Justice Clerk says it "contains an incompetent proposal," which I understand to mean, that it was incomplete—that it was a mere proposal—that it was never carried into effect by a proper allowance of the abandonment after the payment of the expenses. And the rest of the Judges are of opinion, that an abandonment of an action under the Statute—and this professes undoubtedly to be an abandonment of the action under the Statute—is only competent after the record is closed. With regard to the other minute of 1862, Lord Cowan deals with it in this way: He says, "After the issues had been adjusted between the parties, when the questions embodied in these issues were disposed of, I think there was an end of the whole cause embraced under the conclusions of this summons. By the adjustment, and by the interlocutor which followed in the terms mentioned, I think there was a virtual departure from and abandonment of every other ground of action, that was embodied in these two issues." Then he ends by saying, "I think we ought to dispose of the minute of abandonment on the special ground, that there is nothing to abandon, and that therefore it must be withdrawn from process."

Now, without entering into a consideration of whether there can be a part abandonment of a cause, or whether there can be an abandonment of a cause before the record is closed, I think your Lordships may decide in favour of these interlocutors upon a distinct and specific ground which is applicable to this particular case. The minute of abandonment of March 1851 was incomplete, as I have shewn, at the time when the record was closed; but the record was closed in these terms on the 31st of May 1851. The interlocutor is: "Declares the record to be closed on the adjusted revised condescendence for the pursuer No. 9, and the adjusted revised answers No. 50 of process." Now, there can be no doubt at all, that the record was closed with respect to the five roads stated in the revised condescendence, and forming, therefore, part of the record, and that it was absolutely necessary for the Court to dispose of those claims upon the record which were made by the pursuer, because they were not withdrawn from the record. Although, practically, the case was confined to the trial of the issues with regard to two of the roads, still those claims remained upon the record, and it was absolutely necessary for the Court to dispose of them; the Court considered it necessary, first of all, to direct the minute of March

1851 to be withdrawn, and afterwards in their interlocutor of the 6th June 1862, to find, that the pursuers were not entitled to abandon in terms of the said minute." These minutes being out of the question, the claims as to those three roads had to be disposed of, and the only mode in which they could possibly be disposed of, as there was no evidence in support of them, and as they were not withdrawn, was to enter an absolvitor for the defender, and therefore the Court directed that absolvitor to be entered.

I was a good deal struck by the observations which were made by my noble and learned friend (Lord Westbury) in the course of the argument as to the danger which might arise to the public, supposing this interlocutor were to stand with an absolvitor of the defenders, because it might then be said, that that would entirely conclude the public against any future claim with respect to these rights of way. I have very great doubts whether that would be the effect of it. Supposing any future claim to be made in respect of these roads, I doubt very much whether the public would be concluded by this interlocutor. I think it would be quite competent to the party prosecuting such a claim to shew the circumstances under which that interlocutor was pronounced, and undoubtedly, if the circumstances could be shewn, it never could be said, that it was binding against the public.

Under these circumstances I submit to your Lordships, that this interlocutor is perfectly correct. But a question may arise, probably your Lordships may have thought of it, as to what ought to be done with the costs in this case. It appears to me, (I say it with very great deference to the learned Judges,) that they have led the parties completely astray. They ought not to have gone judicially to pronounce those several interlocutors which have been declared to be incompetent. They necessarily, and, as I venture to say, improperly, kept the parties before them, when the parties themselves had proceeded in a way which took the case out of the jurisdiction of the Court. Under these circumstances I submit to your Lordships, that in dismissing this appeal we ought to dismiss it without costs.

LORD CRANWORTH.—My Lords, I entirely concur with my noble and learned friend in the conclusion at which he has arrived in this case. When the jury had returned a verdict, for we must consider it as if they had returned a verdict, that there was a right of way "by or near the red line," it is patent, that the Court had got a finding, that, *per se*, could not be applied. How were the Court to deal with this? It is not necessary for me to say; indeed I should feel myself at a loss to say exactly what, according to practice, ought to have been the course pursued. It is plain, that issues had been directed, which did not exhaust the subject. How was that to be supplied?

The best way to put it for the appellants is this—to treat it as a finding, as no doubt it was a finding, that there was in some direction or other a public right of way from the one point to the other. That was found by the jury; the precise line was not found. I do not say, that it was open to the Court; but perhaps it was open to them to have then put it in some course of inquiry, either by reference to Mr. Wylie or by some other mode, to ascertain what was the course of the public right of way, whether along the red line, or, if not along the red line, how far, and what direction diverging from it. If that had been done, whether it was the proper course or not, it might have led, at least, to an ultimate finding upon that which was the point really to be decided, namely, what was the line of the public right of way? If that had been done, I think, if an interlocutor had been made upon that subject, it might have been right or it might have been wrong, but it would have been upon a totally different footing, to consider from what it is at present. But what the Court did was to direct an inquiry, which upon no possible ground could they have a right to direct, namely, an inquiry, or rather a reference to Mr. Wylie telling him not to ascertain what the line was, but to make a new and convenient line as little as possible burdensome to the defender. That might be, by way of arrangement, an extremely convenient course to pursue, but it immediately took the whole proceeding out of the ordinary *cursus curiæ*, and therefore it was not competent afterwards for the parties to appeal against anything that was done in pursuance of that reference. That is the ground upon which my noble and learned friend has rested his view of the case upon the merits, and I entirely concur with him in the conclusion which he has arrived at on this, the first point in the case.

With regard to the second point, it has always been the rule of your Lordships' House to be as slow as possible to interfere with anything that is mere practice. What really was the case here was this. The parties having entered this minute of the 4th March, abandoning the cause *quoad* the three roads, the record is afterwards made up containing the whole of the condescendence and the whole of the answers, embracing all the five roads. I fully enter into the feeling of the Court, therefore, that when the cause came finally to be disposed of, and they were bound to make a deliverance as to the whole, it was necessary for them to treat the record as they found it, and the result being, in their view, that there was a proper disposal of the case as to the two roads, but no proof at all having been given by the defender as to the three other roads, the absolvitor was a necessary consequence.

I confess I do not feel apprehensive as to any effect which this decision will have upon any of the public who may hereafter assert such a right, because I consider it is perfectly clear, that even

if such a decree as this can be given in evidence, it can be conclusive only if, upon the face of it, it shews, that there has been an adjudication. But upon the face of this decree it would appear that there has been no adjudication.

I also think, that the proposal which my noble and learned friend has made to your Lordships with regard to the costs of this appeal is a right one, because, after all, it is an error on the part of the Court which has led the parties into taking the course which they have taken. Therefore I concur with my noble and learned friend, that the appeal should be dismissed without costs.

LORD WESTBURY.—My Lords, I entirely concur in the conclusion at which my noble and learned friends have arrived. From the moment that the consent of the parties to a verdict and afterwards to a judgment upon the inartificially framed issue was substituted for a regular proceeding, this cause was taken out of the regular course of judicial procedure. No doubt the original issue was inartificially framed, but it contained within it materials for answering, by the jury, two questions—one, whether there was a road along the red line? the other, if not along the red line, whether there was a road along any other, and what line?

The verdict that was taken by consent, or rather the judgment, was a simple affirmative to that issue, an affirmative, therefore, which could not be applied to either one of the questions. In reality, the issue ought to have been directed to be tried, and the insufficiency of the consent ought to have been observed. But, instead of that, the Court have endeavoured to correct the error and to supply the defect by taking a course which certainly was not within their judicial authority, but which, not having been complained of by either party, must be attributed entirely to the consent of the parties. What the Court did was embodied in the interlocutor of the 22d December 1854, and that is certainly not a deliverance in pursuance of any judicial power; it was nothing in the world more than an embodiment of certain terms which may have been approved of by the Court, and which appear to have been acquiesced in by the parties.

Now, that was the basis of all that was subsequently done—a basis constituted of the *consensus* of the parties, and not of the exercise of any judicial authority. It is impossible to interfere with that; it rests upon matters, which are not brought before us, and which we cannot remove. Therefore, that standing, all that subsequently follows is an emanation of the original agreement to take this matter out of the ordinary path of judicial determination. On that ground, therefore, the appeal is wholly incompetent, or rather it is one which we are incapable of entertaining. We cannot apply the ordinary rules of law to proceedings based on an order which is utterly at variance with the ordinary rules of law.

Now, with regard to the other point, undoubtedly I entirely concur in this, that full credit must be given to the Judges of the Court below with regard to a mere matter of practice, unless we are enabled to ascertain, in a manner which admits of no possible doubt, that there has been a miscarriage in the application of their rules of practice. But in this respect, though originally I felt some anxiety and doubt on the point, I am now satisfied, that there has been no miscarriage, in point either of substance or of form. It was undoubtedly competent, I apprehend, by the law and practice of Scotland, to the pursuer, anterior to the closing of the record by minute, (and also by amendment,) to have restricted the conclusions of the summons in his action, provided that minute was so dealt with by the pursuer as to become an irrevocable thing, and to accompany the summons in such a manner as that, when the record was closed, it might plainly appear to be closed upon that restricted summons. But without entering further upon that, what was done by the appellant was different from that course of procedure altogether. It is true he delivered in a minute in March 1851, to which I abstain from giving any kind of designation, because there has been a controversy as to whether it contains the necessary elements of a minute of restriction or not; but even if it was a minute of restriction, the course taken by the appellant afterwards was one which certainly justifies the form of the interlocutor which was finally pronounced, because it is plain, that the appellant thought proper to demand judgment upon the summons which, so far as the closed record is concerned, appears to be unrestricted upon the whole of the pleadings, which pleadings were addressed to the five rights of road that were the subject of the original cause of action. The result was that, on the record so made up and closed, unquestionably the defender was entitled to an absolvitor from that which was disproved, and from that also which had been abandoned.

My anxiety at first was, lest the form of absolvitor should involve in it an apparent conclusion, that the question had been tried and determined on its merits. But I think we ought not to permit any doubt of that kind to interfere with the ordinary form of judicial expression of interlocutors in Scotland, because I must take it for granted, that these interlocutors are so worded, that the real truth of the nature of the absolvitor might easily be ascertained upon an examination of the interlocutor, or of the matters on the record in a process to which that interlocutor would naturally open the door for investigation or proof.

On these grounds, therefore, I entirely concur with my noble and learned friend, that there is no reason to alter the form of the interlocutor in that respect, and that this appeal must fail. But inasmuch as it fails, in consequence of there having been a common undertaking, to pursue a path which was a by path, and not the ordinary judicial high road, I think, as that has been the

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.