position, he produces the exemplification of a judgment obtained by him against one *McIntosh*, who occupied the premises in question when the dam was first constructed as tenant to the defendant, with a right to purchase. Upon the trial of that action, the plaintiff's damages were assessed at £60. As to the admissibility of this judgment, *Blakemore* v. *The Glamorganshire Canal Company* (*a*) and *Philips* on evidence, page 11, were cited.

In cases of this kind, where the jurisdiction which this court exercises is ancillary, it is certainly the practice, as a general rule, to require the plaintiff to establish his title at law. But that, although a general is not an universal rule; it is competent to this court, if it see fit, (*b*) to decree a perpetual injunction, without a trial at law. It is matter of discretion.

There are some obvious reasons why the practice which formerly prevailed in England on this subject, should not be pursued strictly in this court. In the first place, there are many cases of this class, in which this court is obliged to proceed without having the legal question determined by the proper tribunal; because the right of suitors in this court to have the opinion of a court of law is denied. Secondly, the necessity of having the legal title first established at law has been abolished by a recent statute of the Imperial Legislature.(*c*) Lastly, one principal ground of the practice which formerly prevailed was the imperfect mode of taking evidence previous to the recent statute. That reason has no application here; all the witnesses in the case were examined before the court.

Without determining the sufficiency of any of these answers, I am quite satisfied that this objection affords no ground for refusing relief in this particular case. The defendant makes no objection of this sort to the plaintiff's right to recover; on the contrary, his answer closes with this passage, "defendant is willing and begs that a competent person or competent persons be appointed by this court to survey, lay out and place monuments marking the height, width and depth this defendant's dam should and shall be, and the defendant shall abide faithfully by the said decision."

Again, the evidence adduced by the parties appearing to be insufficient, it was suggested that a new survey should be made by a person to be appointed by the court. This proposition was agreed to by both parties, and an order was drawn up, by consent, by which Mr. *Dennis* was directed to take the levels of the stream in its then state, and afterwards to cause the dams of both parties to be removed, so as to ascertain conclusively the effect of the defendant's dam. This order was complied with. Mr. *Dennis* has been examined before us as a witness; and, if the evidence be satisfactory, I am of opinion that it is our duty to dispose of this case now. It was competent to these parties to submit the question of nuisance to this court; they did so submit it, and the evidence before us is much more satisfactory than it is possible, in ordinary cases, to submit to a jury.

*Lord Cottenham* has discussed the law upon this subject in several of his most elaborate judgments; and in one of them, *Bacon* v. *Jones* (*d*), there are some observations very pertinent, as it seems to me, to the present case, "when the cause comes to a hearing," he observes, "the court has also a large latitude left it, and I am far from saying that a case may not arise in which, even at that stage, the court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the faame of the pleadings, the nature of the right, and of the evidence by which it is established,—these and other circumstances may combine to produce such a result; although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless it is a course unquestionably competent to the court, provided a case be presented which satisfies the mind of the judge that such a course, if adopted, will do justice between the parties." And in *Cory* v. *The Yarmouth & Norwich Railway Co.*, Sir *James Wigram* says, "If, on the other hand, the court is clearly with him, the court may, in the exercise of its discretion, grant the injunction in the first instance, there being no doubt whatever, although the question is a legal one, and though a court of law is the proper tribunal before which such question should be tried, that a court of equity may decide the legal question if it thinks fit."

I am satisfied, therefore—subject to the question as to the sufficiency of the evidence—that this case ought to be disposed of here. Before proceeding to examine the evidence, it will be convenient to advert briefly to the state of the law upon this subject, which, at one period, would seem to have been greatly misunderstood. It is said in 1 Wm. Saund. 114 a. n. 9, that "a mistaken notion appears to have prevailed for some time that the right to flowing water is *publici juris*, and that the first occupant of it for a beneficial purpose may appropriate it, and thereby gain a good title against all the world, excluding the proprietor of the land below, who may thereby be deprived of the benefit of the water, unless he has already applied the stream to some useful purpose." That doctrine is stated very plainly, as it seems to me, by Sir *William Blackstone* (*a*) in his commentaries, and, also by several judges of acknowledged learning. (*b*). Lord *Denman*, indeed, considers that the passage from *Blackstone*, and the dicta to which I have adverted, have been misconceived; but it is very difficult to reconcile the language to be found in the commentaries, and in the reported cases with the law as it is at present understood. In his chapter "on title to things possessed by occupancy," *Blackstone* says, "Thus too the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy, * * * * * If a stream be unoccupied, I may erect a mill thereon and detain the water; yet not so as to injure my neighbour's *prior* mill or his meadow, *for he hath by his first occupancy acquired a property in the current.*" And in *Liggins* v. *Inge*, Chief Justice *Tindal* says, "Water flowing in a stream, it is well settled by the law of England is *publici juris*. * * And, by the law of England, the person who first appropriates any part of this water flowing through his land to his own use has the right to the use of so much as he then appropriates, against any other." *Bayley, J.* says, "Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it." And in *Bealey* v. *Shaw*, Mr. Justice *Le Blanc* says, "The true rule is, that after the erection of works, and the appropriation by the owner of land of a certain quantity of the water flowing over it, a proprietor of other land afterwards takes what remains, the first owner, *however he might, before such second appropriation, have taken to himself so much more*, cannot do so afterwards."

These passages do not seem to me to admit of the construction which has been placed upon them by Lord *Denman*. But, however that may be, this doctrine, if it did prevail, is plainly erroneous; it confounds the corporeal thing, water, with the incorporeal right to have it flow in its accustomed channel; it treats the appropriation of a given portion of water from a stream as an appropriation of the current itself, which it plainly is not; for running water, from its very nature, is incapable of occupancy; and it assumes the absence

(*a*) 2 C. M. & R. 133.

(*b*) Farwell v. Wallbridge, 2 Grant 341, and cases cited; Cory v. The Yarmouth and Norwich Railway Co., 3 Rail Ca., 531.

(*c*) 15 & 16 Vic. ch. 86, sec. 62.

(*d*) 4 M. & C. 437.

(*a*) 2 Black. Com. pp. 14, 15, 402.

(*b*) See the judgment of Le Blanc, Bealey v. Shaw 6 East 208; of Holroyd, Saunders v. Newman, 1 B. & Al. 258; of Bayley, Williams v. Morland, 2 B. & C. 910; of C. J. Tindal, Liggins v. Inge, 7 Bing. 682.