CASES

TRIED IN

THE JURY COURT.

PRESENT,

THE THREE LORDS COMMISSIONERS.

RAEBURN and Others *v.* KEDSLIE and Others.

1816. January 22.

A steam-engine, of an improved construction, in the vicinity of the New Town of Edinburgh, found not injurious to property.

THIS was a suspension and interdict at the instance of Mr Raeburn, and other heritors in the neighbourhood of Stockbridge, and also of a number of the feuars in Great King Street, to prevent Mr Kedslie using a steam-engine, on the ground that it was a nuisance, and a *novum opus*.

DEFENCE.—The engine is of an improved construction, and not a nuisance in itself; nor would it be one in such a situation, though it were not so constructed.

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In the Court of Session, the pursuers complained of the engine as a nuisance attended with intolerable discomfort, and productive of great injury to their property, as placed not in a situation "appropriated to manufactures," or "debased by nuisances," but in the immediate vicinity of the New Town, to the completion of which it must absolutely put a stop.

They stated, that some of them had been led to believe that this engine would be quite inoffensive, but when they found the quantity of smoke issuing from it, they wrote to Mr Kedslie that they were persuaded the engine was much more offensive than he had expected, and trusted he would stop it till he had consulted with men of science, and made the necessary improvements, as it was impossible for them to submit to a nuisance so grievous; but they were willing to give him as little trouble as possible, if he would improve the engine.

Mr Kedslie admitted that at first there had been a great deal of smoke, owing to the ignorance of the man who supplied the engine with fuel, but that it was now diminished by a half, and would be still more so as they became better acquainted with it; that it was one of

the best construction; and that if any improvements could be suggested, he would adopt them.

After hearing counsel on the case, the Lord Ordinary appointed the complainers to give in a condescendence, which was followed by answers, and these being revised and amended, and the Court having decided that this was a proper case to be sent to a Jury, they approved of the following

ISSUES.

"Whether Mr Kedslie, the charger, did, in "the course of the year 1814, in the village "of Stockbridge, erect a building containing a "steam-engine, the smoke or exhalations from "which are or may be injurious to the health, "or comforts, or property of the possessors of "the houses and gardens upon the property of "the suspenders, in the neighbourhood of the "said steam-engine, and are or may be likewise "injurious to the said property of the suspend-"ers, and in what respect, and to what ex-"tent? And,

"Whether, according to the averment of "the charger, machinery, or other means, can "be applied, which will render the smoke and

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" exhalations from the said steam-engine in- " noxious, and what these means are?"

The pursuers called a number of witnesses, who swore that they had seen volumes of smoke issuing from the engine; that the air was sometimes darkened by it, and they saw particles of soot falling on their clothes. Some of those living in the neighbourhood stated, that they had been under the necessity of closing their windows to exclude the smoke; a gardener had his hothouse filled with it on one occasion, but admitted, that no objection had been made to his fruit, and that he had got a premium for flowers. Mr Raeburn's servant swore that Mrs Raeburn had found fault with him for leaving the window open, as the furniture was spoiled by the soot; and the female servants stated, that they sometimes had occasion to wash a second time, linen laid on the green.

On the other hand, it was proved that this engine was of the most approved construction. Mr Professor Leslie and the engineer were doubtful of proposing any alteration, and stated, that, if properly managed, there ought to be very little smoke. A great many witnesses having property, or residing at or near Stockbridge, swore that the engine was not injurious

to their comfort, health, or property. A number of washerwomen live at Stockbridge, who proved that they suffered no inconvenience from the engine; and one of them swore that she had seen particles of soot falling on the linen, but that the same had happened before the engine was erected, and that she did not know any difference since; and a dyer of silk proved that it had not done any hurt to the silk when hung out to dry. It was also proved that some of the witnesses for the pursuer lived as near, or nearer, other erections equally noxious.

Grant, in opening the case for the pursuer, and *G. J. Bell* for him in reply, contended, That the engine was a substantial, not an imaginary grievance; that it was injurious to the property, &c. of the neighbours; and though, at present, it was only used to work the mill when there was a scarcity of water, yet it might afterwards be applied to other purposes. They said they had no interest in the second issue.

Jeffrey, for the defender, contended, That Stockbridge was a suburb of Edinburgh, and liable to all the inconvenience of a suburb of a great city; that, being on a lower level, it natu-

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rally could not be a pleasant residence; that there were in it smithies, ovens, a boiling-house, and near it a skinnery and two distilleries, any one of them sending out more noxious vapour in an hour than this engine does in a day; that the defender Kedslie lives nearest this engine; and that the witnesses for the pursuer had mistaken the smoke of the other works for that of the engine. To entitle the pursuers to a verdict, it was not enough to prove the engine injurious to their property, they must prove it to be so to a great degree. The jury were not entitled to find nuisance or not, but they ought to go as far as possible in settling the point in dispute; that, if they found for the defender, it would be unnecessary to go into detail, but if for the pursuer, then they must determine the extent; and perhaps the best way would be to take so many common chimneys as the measure.

The LORD CHIEF COMMISSIONER, after the evidence was closed, congratulated the jury on the satisfactory manner in which the proceedings had been conducted in this first trial, and stated, that, though they could not find whether in law this was a nuisance, yet if they were of opinion that the pursuer had not made out his

case, then they might negative the issue sent; or if they preferred, they might return special findings on the different parts of the issue.

Counsel have fairly stated, that it is not every degree of hurt to the property that would entitle the pursuers to a verdict, but that the injury must be material. The jury must consider whether this degree of injury has been proved.

His Lordship then said, That as to the time of erection of the engine the return by the Jury must be in the affirmative,—that the alleged injury to health was abandoned,—that in interpreting the terms of the issue the jury would understand that "comforts" meant comfort of living, and that injury to property in the first part of the issue meant physical injury done to furniture, &c.; and, in the second part it meant the supposed deterioration of the property in the neighbourhood. He then proceeded to describe the evidence given, but he would say nothing of the extent of the injury till he knew whether they were of opinion that the engine was injurious.

He meant no reflection on the pursuer's counsel, but could not fail to observe, that the person who showed the engine to those of the

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jury who had the view, * though a material witness, was not called. After stating the evidence of the other witnesses, his Lordship said, that though in general evidence is to be weighed, rather than numbered, it is difficult in this case to withstand the number of witnesses brought forward on the part of the defender, especially when it is considered that most of them have a material interest to put down this engine if it is really hurtful. Though not wishing to encroach on the province of the jury, it may be a satisfaction to them to know, that the Court do not think the pursuers have made out their case.

The jury "Find that the steam-engine was "erected by the charger in the course of the "year 1814, and return a verdict negative as "to all the other parts of the issue."

G. J. Bell, *Grant*, and *Cockburn*, for the Pursuers.
Forsyth, *Jeffrey*, and *Cuninghame*, for the Defenders.

(Agents, *James Pedie*, W. S. and *James Greig*, W. S.)

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* In this case, the Jury had a view in terms of the act 55. Geo. III. c. 42, § 29.