In this case the premium was 10s. 6d., and there is a cloud of witnesses to prove that this was sufficient to cover the whole risk. The sea risk had a premium attached to it as much as in the case of war or peace. Without the risk at sea the premium is proved to be 3s.

The risk is taken by persons who say they had no power to take it; but they should have said so before. If you agree with me in the view I have taken, you will not make any distinction amongst the defenders, but find generally for the pursuers.

Verdict—"For the pursuers."

Forsyth, Jeffrey, and *Cockburn,* for the Pursuer.
Solicitor-General and *Jardine,* for the Defenders.
(Agents, *Ro. Rutherford,* w. s. *Daniel Fisher,* w. s.)

PRESENT,

LORDS GILLIES AND MACKENZIE.

ARROTT v. WHYTE, AND HAMILTON v. WHYTE.*

1826. Dec. 27.

Damages for a nuisance.

THESE were two actions to recover damages on

A view refused in a case of nuisance.

* These cases were set down for trial at Glasgow; and on the first day of the sittings (18th September 1826) an appli-

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account of injury done to the properties of the pursuers by manufactures carried on by the de-

cation was made for a view, which it was stated Lord Mackenzie had refused on what was thought a misconstruction of the 51st section of the act of sederunt.

Jeffrey.—This was settled by one of the Judges, and there is no power of review. There is not now time before the trial, and a view would only mislead.

Moncreiff.—We made the application more than six days before the trial, and had a right to a view; but having been refused, we are now entitled to it.

LORD CHIEF COMMISSIONER.—It is clear on every ground that this should not be granted. The 51st section overrides, and was meant to override, every section; and it requires that this motion should have been made during the session. It seems to me that Lord Mackenzie has put the true construction on the act. The six days are necessary, as many things are to be done; though in a case requiring a view perhaps the Court would grant it, though the motion was not made during the session. But I think it right to state, that the Court was at first too lax in granting views, and that there is reason to fear that in some cases they have not tended to the ends of justice. In some cases a view is essential, but in others the reverse. It is most important that this case should come before the jury without prepossession, and a view would be disadvantageous.

One Juryman being taken ill during a trial, incompetent to proceed with the remainder of the Jury.

On the following day, 19th September, the case proceeded to trial; and after the pursuers had led a great part of their evidence, one of the jury was taken ill; and it being proved by two medical gentlemen then in Court that he was not in a state of health fit to proceed with the case, an application was made to the Court to proceed, of consent with the remaining eleven, or that the case should be taken on the following day.

fender, and to have the work removed as a nuisance.

DEFENCE.—The manufacture was carried on long before, and at the time the pursuers purchased their properties; and even if it amounts to a nuisance, the pursuers have acquiesced in it.

ISSUES.

"It being admitted that the pursuer is pro-

LORD CHIEF COMMISSIONER.—This cannot put off the other case which is fixed for to-morrow; and if it is to be strictly dealt with, perhaps a new notice of trial may be necessary.

LORD PITMILLY.—It is the earnest desire of the Court to relieve these parties in the unfortunate situation in which they are placed; but we must walk by the acts of Parliament constituting the Court; and I have no doubt that the proposal to proceed with eleven jurymen is incompetent.

LORD CHIEF COMMISSIONER.—Nothing but the difficulty in point of law being insurmountable could induce us to come to the decision that this is incompetent. It is very desirable that the case should be tried, and for that purpose I would even return next week; or perhaps the parties might form a tribunal for themselves, and agree to refer it to two men of business, and to some person high in the law, to decide the point of law, as it is clearly a legal point.

The case was accordingly delayed. In November a motion was made, that the cases should be tried at Glasgow; but the Court refused the application, on the ground that the expence would be nearly balanced, and that they were cases in which delay should not be allowed.

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" prietor, and has been proprietor since 1807,
" of a house and about three acres of arable
" land, situate on the banks of the river Clyde,
" and that the defenders are proprietors and
" tenants of about three acres of land immedi-
" ately adjoining on the north-west to the pro-
" perty of the pursuer :

" It being also admitted, that, upon the pro-
" perty occupied by the defenders, there are
" erected buildings in which soda and other
" substances are manufactured :

" Whether on or about the 1st day of Ja-
" nuary 1816, and subsequent thereto, there
" arose, and continued to arise from the said
" manufacture, certain noisome, offensive, nox-
" ious, or unwholesome vapours or stenches,
" which were diffused or spread over the pro-
" perty of the pursuer, to the nuisance of the
" said pursuer, whereby the said property was
" deteriorated, and the pursuer incommoded
" and annoyed in the enjoyment thereof, to
" the injury and damage of the pursuer ?—Or

" Whether in the aforesaid year 1807, and
" prior thereto, the vapours issuing from the
" manufactures carried on in the premises of
" the defenders, and in the neighbourhood
" thereof, were as great, or nearly as great, in
" quantity, and as noisome, noxious, offensive,

" or unwholesome, or nearly so, in reference to " the premises, now the property of the pur- " suer, as those issuing from the premises of " the defenders at the commencement of the " present action in 1823?

" Whether, for a tract of time subsequent to " the acquisition of the aforesaid property by " the pursuer, the vapours issuing from the ma- " nufactures carried on in the premises of the " defenders, and in the neighbourhood there- " of, were as great, or nearly as great in quan- " tity, and as noisome, noxious, offensive, or " unwholesome, or nearly so, in reference to the " said premises, now the property of the pur- " suer, as those which issued from the same in " 1823, without any challenge or complaint be- " ing made against the same by the pursuer?"

Buchanan opened the case for the pursuer, and stated, That this was not in a situation appropriated to nuisance; that at the time of the purchase offensive smells, but nothing noxious, occasionally issued from the manufactory, from discharging Turkey red; but that the substances manufactured were now soda and bleaching-powder, which destroyed the trees and shrubs on the pursuer's property. If the defenders mean to establish acquiescence, they

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must prove the works to be the same as formerly; whereas there are now fifty-one chimneys, and formerly there were only three. On the law I would only refer to one case.

When evidence was offered of damage done to the pursuer's property during 1825,

Jeffrey, for the defenders, objects, This action was then in Court, and the damage must be limited to the date of the action. The proof must be as if it had been taken the day the case came into Court.

Moncreiff.—The evidence is offered to prove the nuisance.

Charity *v.* Riddell, July 5, 1808.
In a question of nuisance, evidence may be given of the state of the works subsequent to the date of the summons.

LORD GILLIES.—With regard to the damage the Court go into the reasoning of the defender; but this action goes to the abatement of the nuisance, and the nuisance may be proved by evidence up to the present time, though the jury can only give damages for injury prior to 1823. But the question may be attended with some difficulty, and the object does not seem very material.

Upon this Mr Moncreiff did not insist in the questions put.

A juryman having asked a witness to state the quantity of grass injured, Lord Gillies ob-

served, that the real question was, Whether this was a nuisance to be put down? and that the damage could not be estimated by proof of such details.

Evidence was afterwards called to prove the injury done to the properties, which one of the witnesses estimated above L. 1000 on each.

Jeffrey, for the defender, said, This is the first instance, since the institution of this Court, where the rules of nuisance are to be practically applied. This, I admit, would be a nuisance, if introduced into a pure neighbourhood; but I cannot on that ground admit that it is to be put down, or even restricted, as it is in a situation which has been appropriated to offensive works for more than forty years. In the country draining land, or in town building upon property, may materially injure the neighbouring property, but cannot therefore be prevented.

In some cases a manufacture is objectionable as a public nuisance, but that must be in a populous neighbourhood; and this explains the decision in the case of Charity, which, however, has not been supported by subsequent and better-considered cases. A small extension of an offensive work will be defended, if required by the improvement of the manufac-

Dewar v. Fraser, 20th January 1767, Mor. 12803

Charity v. Riddell, July 5, 1808.

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Ballenie *v.* Comb, Feb. 3. 1813.

ture, or the extension of the trade of the country. The object of the defenders is to obtain muriatic acid, which is necessary for the manufactures of the country; and it is their interest to prevent the escape of the substance (oxymuriatic gas,) of which the pursuers complain.

On the plea of acquiescence, it is of importance that nothing was done by the pursuers till 1820, after all the works were erected, and a large sum of money expended, and the works carried on from 1816 to 1820 under the eyes of the pursuers; and even if there was a short intermission from the bankruptcy of a company, that does not prevent the parties from resuming the work. I doubt, in the present case, if the additions could be complained of, even if this were a pure neighbourhood, as they are necessary additions to the original soda works. There is nothing to trace the damage to the additions.

Aiton *v.* Melvill, 19th May 1801.

More, for Tennant and Company.—My clients entered in 1822, and left the works at the first term after they were questioned; and having entered *bona fide*, and being only tenants, their case differs from the proprietors.

After the evidence for the defender,

Moncreiff.—The question in the issue is simply, Whether noxious vapours, &c. arose,

and what was the damage suffered by the property of the pursuer? There is no separate question as to any party; and though there are cases of nuisance involving law, there is very little in the present case.

This is a case of direct damage done to my property by a work of my neighbour; and, however profitable to him, there is no doubt he is liable for the damage done. It is said I am not entitled to complain of the extension of the work; but if the work is illegal at first, I may complain of the extension, as was held in Charity and Dewar's cases, and Ralston's case confirms the principle. It is said Ballenie's case affects that of Charity, but it was there found that there was no addition.

Ralston v. Pettigrew, 29th July 1768, Mor. 12808.

Here the question, simply of nuisance or not, does not apply, as there is a great injury done, which is concomitant with the new works. I ask damages for the injury done by the works commenced in 1816; and it is no answer to say, that there were other works in some respects similar in the same situation prior to that date. Certain things constitute a nuisance; and if you bring a nuisance on your property, and it does injury to mine, I am entitled to complain, and have it abated. The properties were bought as villas, and are spoiled for that pur-

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pose; and the facts are not to be set aside by theory.

We neither came to the nuisance, nor acquiesced in it; and the main object is a verdict finding it a nuisance to our injury and damage, that the Court may put it down; but this is not sufficient, we must have serious damages besides for what is past.

LORD GILLIES.—This is a case purely for the jury; and you gentlemen have nothing to do with the prosperity of manufactures, or the relative consequences that may follow from your verdict. It is your business here to do justice between man and man; and the greatest benefit we can do to the country is to discharge our duty, and in the present case to return a true answer to the issues before us. Much law has been stated, and many decisions quoted, which appeared to me out of place.

There is no doubt that a man may use his property in the way he thinks best; but it is equally true that he is not entitled to put a nuisance upon it. The decisions were even more out of place than the principle of law, as every case depends on its own circumstances; and that is a nuisance which a jury of intelligent gentlemen think so in the circumstances

of each case. There is a note by Mr Ivory on a passage in Erskine, where two cases are mentioned, and where opposite decisions are apparently given; but I hold both decisions to be right. Your duty upon the facts proved is to draw the conclusion whether this is a nuisance, as between one neighbour and another.

Ersk. II. 1, § 2.

On the first issue, it seems clear that the vapours, &c. were hurtful; still, if you are of opinion with the defenders on the second and third, you cannot find that it was to the injury and damage of the pursuer. If you are of opinion for the defenders on the question of nuisance, that ends the case; but if you are of opinion for the pursuers, you must then suspend your judgment, as to the injury and damage, till you have made up your minds as to whether the pursuers came to the nuisance, or acquiesced in it for a track of years.

The question on the first issue is, Whether the nuisance existed in 1816? and on this I do not think there is much contrariety of evidence; and if you are of this opinion, it is of the more consequence to attend to the contrariety of evidence on the other issues. There are two defenders; and if the fact was merely as to coming to the nuisance, then the difference of the date of the purchases would be of consequence. But there is also a question of

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acquiescence, and taking Arrot's, which is the latest, it appears to me to decide both; for if he came to the nuisance in 1807, that also decides Hamilton's, on the ground of acquiescence; for, though it is a nice point to decide the precise time that shall be sufficient to constitute acquiescence, still I hold it clear that acquiescence from 1807 is quite sufficient. But if the nuisance has only existed since 1816, then it is for you to say whether there is acquiescence, or whether the complaints, extrajudicially and by protest, are sufficient to save the right of the pursuer; and it is beneficial for the country that it should be in your hands to consider the evidence.

On the third issue, I am sorry to say that there is contrariety of evidence; and you must consider which are most to be credited. The evidence for the pursuer was clear; and the question is not as to this or that mode of manufacturing, but the fact of nuisance to the pursuer; and if you believe his evidence, you cannot believe that it existed to the same extent in 1807; and if you believe the fact as to the trees being injured, this belief will not be shaken by the scientific evidence.

The damages will not give you much trouble, as the value of the crop or trees is not much

insisted in, and very slight acquiescence will bar a party from claiming for mere inconvenience. He may get the value of the trees, but not for amenity, as he is bound to claim at first, and not allow it to go on for years. Acquiescence may be sufficient to bar this claim for damages, though not sufficient to continue the nuisance.

The jury at first came into Court with a verdict for the pursuers on the first issue, with L.5 damages; but being informed by the Court that this implied a verdict on the other issues, and that it would be better to find upon them, they again inclosed.

Verdict—"For the pursuers, on all the issues. Damages L. 5."

Moncreiff, D. F. and *Buchanan*, for the Pursuers.
Jeffrey, Cockburn, and *More*, for the Defenders.
(Agents, *John Young*, *C. J. F. Orr.*)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

INNES AND OTHERS, TUTEIN AND OTHERS, AND KOLN *v.* GLASS AND COMPANY.

1827. Feb. 26.

In an action against the owners of a vessel for

THESE were three actions against the owners of the Corsair, on the ground, that that vessel