[30*th July* 1838.]

JAMES HAMILTON Esq. and ARCHIBALD ARTHUR, Appellants.—*Dr. Lushington—Austin.*

WILLIAM DUNN Esquire, Respondent.—*Attorney General (Campbell)—Sir Wm. Follett.*

Landlord and Tenant.—Nuisance.—A landlord let premises to a tenant for nineteen years, "to be used for the purpose "of bleaching, dyeing, or printing, and any other opera- "tions connected with bleaching, dyeing, or printing, or "for agriculture," and the tenant subset the premises. In an action against the landlord, the tenant, and the sub-tenants, for interdict, on the ground that the operations of the sub-tenants amounted to nuisance, two issues were sent to trial, one as to the fact of nuisance created by the sub-tenants, and another "whether the landlord "or tenant, by themselves or another or others autho- "rized by them, did wrongfully pollute and spoil the "water, &c." At the trial the Judge directed the jury on the first issue in terms as to the law which were afterwards held to be erroneous, and on the second issue that even if nuisance was proved against the sub-tenants, still as there was nothing but the lease to connect the landlord and the tenant therewith, there was no ground in law for holding that they or either of them had authorized or were answerable for that nuisance; and a verdict, which was found for all the defenders, was set aside, and a new trial allowed on both issues; and this was acquiesced in as to the first issue:—Held (affirming the judgment of the Court of Session) that as the charge given under the first issue was erroneous, a new trial should be allowed of the second issue.

THE respondent is proprietor of the lands of Faifley and Duntocher, in the parish of Kilpatrick and county of Dumbarton, on which he has erected several extensive cotton mills. Through these lands there flows a stream named the Cochno or Duntocher Burn, which, for a period beyond the memory of man, has been employed for manufacturing purposes, and on which there have existed dye-works for more than a century. Immediately on its entrance into the respondent's property, it passes into a dam or reservoir, and during its whole course through the lands of Faifley and Duntocher, it passes from one reservoir to another, being constantly either in them, or in the connecting leads, or conducting channels, and turning the wheels of the several works situated on its banks. Before reaching the respondent's lands this stream passes through the property of the appellant, Mr. Hamilton, and about a mile above the boundary of the respondent's property there are certain premises now occupied as a Turkey-red dye-work situated on its banks on the lands of the appellant Mr. Hamilton. These premises had been let about fifty years ago to one M'Nicoll as a printfield, and had been used as such by him, and they were afterwards occupied by one Colquhoun as a bleachfield, and on his leaving them in 1822 they were let by the late Mr. Hamilton, father of the appellant, to the appellant Arthur, at a rent of 60*l.*, for a period of nineteen years, by a lease in the following terms:—

" All and whole that bleachfield, with the buildings
" thereon, lying on the south side of the road leading
" from Edinbarnet lint-mill to Faifley, and as presently
" possessed by Alexander Colquhoun, bleacher there,

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" lying within the parish of Wester Kilpatrick and " shire of Dumbarton, and that for and during the " complete term and space of nineteen years from and " after the term of Whitsunday 1823, which is hereby " declared to be the term of the said Archibald " Arthur's entry thereto; declaring always that the said " subjects hereby set are to be used for the purpose " of bleaching, dyeing, or printing, and any other " operations connected with bleaching, dyeing, or " printing, or for agriculture." It also contained a clause of absolute warrandice, and Arthur bound himself that he should keep the buildings and fences in good condition, crop the land contained in the lease as there prescribed, and " leave the lands at the expira- " tion of the lease fitted in all respects for the " purposes foresaid, and shall make and use them " in no other way than is before specified, without the " consent in writing of the said James Hamilton or his " foresaids."

Arthur entered into possession of the premises thus let, and occupied them as a bleachfield till 1826, when he subset them at an increased rent to certain parties, who are thus described in the sublease:— " James M'Donald, printer at Dalmarnock, and " James Young and Angus Fletcher, merchants in " Glasgow, intending to carry on business as printers " at Cochney, under the name and firm of M'Donald, " Young, and Company," and to their heirs and " assignees.

This sublease, which was granted expressly " under " the several conditions particularly specified and con- " tained" in the principal lease, came ultimately to be

vested in James M'Donald and Hugh M'Kay, and under it the premises were, from the commencement of the sublease in 1826, used for the purposes of Turkey-red dyeing, which is a process of a peculiar nature, and of comparatively recent introduction.

The work, which was let to M'Donald and M'Kay, was situated on the Cochno or Cochney Burn, which, after flowing through Mr. Hamilton's estate, is joined within the lands of the respondent by another burn, called the West Burn, and the united stream flowed down through the lands of the respondent, who had erected extensive spinning-mills and manufactories on his property along the stream. There were also villages on its banks, within his property, containing a population of 3,000 persons and upwards.

In 1834 the respondent raised an action before the Court of Session against the appellant Mr. Hamilton, and against Arthur the principal tenant, and M'Donald and M'Kay the sub-tenants, seting forth, that on part of the property of Mr. Hamilton there was a work occupied by M'Donald and M'Kay, on the side of the Cochno Burn; that within these few years it had been changed from a bleachfield to a Turkey-red dye-work; "that from the said "work the defenders, or one or other of them, have "taken upon them to discharge into the said burn "great quantities of the most impure, noxious, and "deleterious substances, consisting of madder roots or "other substances of that description," whereby the stream was rendered totally unfit for the use of man or beast, the fish in it were killed, its colour turned to blood, and its smell rendered most offensive. The

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conclusions of the action were, that "the said James "Hamilton and Archibald Arthur, and M'Donald "and M'Kay, (as individuals and partners,) should "be interdicted from discharging any madder-roots, "or water impregnated with the same, or other "dye stuff or deleterious or noxious or impure "stuff of any kind, into the said burn, whereby the "said burn, in its progress through the pursuer's "property, may be polluted or rendered unfit for "domestic use or manufacturing purposes, or its "amenity diminished, or the property of the pur-"suer in any way injured," reserving all claim for "damages.

In defence against this action Mr. Hamilton stated, that the premises had "been used as a dye-"work and bleachfield for a period beyond the years "of prescription, with a certain interval as to the "dyeing operation; that the present lease was granted "in 1822, the purposes for which the premises were "to be used being specified to be for bleaching, "dyeing, or printing, and other operations connected "therewith; that all these operations were carried "on, and considerable expense laid out on the "work, in the knowledge of the pursuer, without "a whisper of complaint from him, till immediately "before intenting this action; that the water dis-"charged from the dye-work passes through a filter "before entering the stream; that from the moment "it passes the dye-work it is drunk by the cattle of "the defender's tenants, and those on an intervening "property, without the slightest injury; that the "pursuer has himself a dye-work and a gas-work

" on the stream, a little below the point where it " enters his property, the discharges from which are " much more noxious and injurious than those com- " plained of; and that, in point of fact, no injury is " done to the water by the operations carried on in " the dye-work occupied by the defender's tenants. " At all events, if any injury occasionally happens, it " must be owing to the negligence or misconduct of " the tenants themselves, in exercising their powers " under the lease, which are in no degree necessarily " productive of injury to the water, and for this they " alone are responsible. At the same time, the de- " fender is perfectly willing to concur in any measures " which may be recommended by men of skill as ne- " cessary to secure against such occasional injury, if it " do occur, which the defender does not admit to be " the case."

In his defence, Arthur stated, that his actual possession of the premises had only been from 1823 to 1826; that he had used them as a bleach-field during that period, and had not in the least injured the water in the burn; and that he had not granted, under the sub-tack, any broader right than he himself held under the principal tack from Mr. Hamilton.

On the part of M'Donald and M'Kay it was stated, that though the refuse from their works was necessarily, to a certain extent, discharged into the burn, they had adopted unusual, and even unnecessary, precautions to limit it as much as possible; and that though the water was occasionally tinged by such discharge, it was not rendered noxious, unwholesome, or unfit for other pur-

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poses; and they denied the respondent's allegations on that subject. They alleged that their works were not more injurious to the water than a bleachfield would be; and that they had been used as a bleachfield and dye-work beyond the long prescription. They also alleged that the respondent had acquiesced for eight years in their use of the works, during which period they had made expensive erections for carrying them on.

The two following issues were sent to trial.

" It being admitted that the pursuer is proprietor " of the lands of Duntocher and Faifley, situated on " the side of the Cochney, Duntocher, or Dalmuir " Burn, and that one of the streams which unite to " form the said burn passes through the property of " the defender Hamilton; it being also admitted, that " on the said property of the defender Hamilton there " are certain premises and buildings erected, of which " the defender Arthur is or was tenant, and the " defenders M'Donald and M'Kay are sub-tenants; " Whether, during the year 1826 and subsequently, or " during any part of the said period, the defenders " M'Donald and M'Kay did, by certain operations " carried on in the said premises and buildings, wrong- " fully pollute and spoil the water of the said burn, so " as to injure the quality of the water of the same, to " the nuisance of the pursuer as proprietor of the " lands aforesaid? Whether during the said period " the defender Hamilton or his predecessors, or the " defender Arthur, by themselves, or another or " others authorized by them, did wrongfully pollute " and spoil the water of the said burn, so as to

" injure the quality of the water of the same, to " the nuisance of the pursuer as proprietor of the said " lands ?"

The trial came on at Glasgow in September 1836 before Lord Jeffrey and a special jury.

The respondent adduced evidence to prove his allegations of nuisance arising from the operations as carried on by the occupying tenants; but his case, in so far as regarded the present appellants, the landlord and principal tenant, was limited to the original lease by the former, and the sublease to the occupying tenants by the latter.

The appellants led no proof, and on this state of the evidence Lord Jeffrey directed the jury, with reference to the second issue, as follows:—" And the said Lord " Jeffrey did further direct the jury, in point of law, " that with respect to the liability of the landlord and " principal tenant, under the second issue,—assuming " that there had been actual nuisance proved,—as " there was nothing to connect these defenders with " the supposed nuisance but the lease and sublease " granted by them respectively, there was no ground " in law for holding that they or either of them had " authorized or were answerable for that nuisance: " That the other defenders, the persons in occupation, " did not stand in the relation of agents or servants of " the landlord or principal tenant, and that although " they might have misused the manufactory, the land- " lord was not liable for a nuisance by the tenant in " occupation, unless that nuisance had been sanctioned " by him: That as the lease in this case said nothing " as to Turkey-red dyeing, but simply related to

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" dyeing, which did not mean the establishment of any " dye-work poisonous to the water, this did not imply " a licence to carry on the dye-work in such a way " as to be a nuisance: That the question then was, " whether it was possible to carry on a dye-work on " this stream, at an ordinary profit, without committing " a nuisance? That the pursuer having led no evi- " dence that this could not be done, the defenders in " this second issue were entitled to a presumption in " their favour; and that if the jury were satisfied, in " point of fact, that a dye-work might be carried on " in these premises without a nuisance, or that injury " might be prevented without much expense, then the " landlord was not liable for any negligence in the " carrying on of the work; and as there was no proof " to connect him or the principal tenant with the " existing dye-work, except the lease, they were not " responsible in law for the carrying on of that work, " or for any nuisance thereby occasioned." The jury returned a verdict for all the defenders, and on both issues.

To the above direction an exception was taken by the respondent, who also took other exceptions, five in number[1], to the previous part of his Lordship's charge in reference to the first issue, which regarded the occupying tenants only. The bill of exceptions, embracing all these exceptions, among which that now in question was numbered the "sixth," having been argued before the First Division of the

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[1] See 15 D., B., & M., 853, where the bill of exceptions and the opinions of the Court will be found.

Court, their Lordships, on the 11th March 1837, pronounced the following interlocutor:—"Sustain the "bill of exceptions as to all the exceptions, excepting "the fifth exception, which is disallowed; set aside "the verdict in this case, and grant a new trial of both "issues, but find no expenses due."

Mr. Hamilton and Mr. Arthur appealed against this interlocutor, in so far as it allowed the exception to the direction above recited, and in so far as it set aside the verdict, and granted a new trial on the second issue.

Appellants.—The respondent was undoubtedly entitled to an interdict against the party actually doing the wrong, if he succeeded in proving the nuisance alleged. To entitle any one, however, to an interdict against another, it is not enough that the act sought to be interdicted is one which the latter has no right to do, and which will injure the party complaining; it is necessary that the party sought to be interdicted shall have previously committed a wrongful act by himself, or others authorized by him to commit it, or given just ground for apprehending that he was about to commit it. This has been long settled in the law of Scotland, and indeed it was conceded by those Judges who concurred in the interlocutor of the Court below. If, therefore, the respondent had, in his summons, merely alleged that the discharge complained of was the act of the occupying tenants alone, he could have sought no interdict against the principal tenant or the landlord. He would have had his remedy by interdict against the occupying tenants who had com-

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mitted the wrong; but he could not have sought any interdict against the landlord and principal tenant, who were not alleged to have done or authorized the wrong.

Accordingly, recognising this principle, and the necessity of alleging the nuisance complained of to have been the act of these parties as well as of the the occupying tenants, in order to raise any case as against them, the respondent in his summons and on the record expressly alleged the nuisance complained of to be the act of all the defenders equally.

The respondent at the trial abandoned all attempt to establish that the appellants had polluted the water by themselves, so that the only question came to be, whether they had done so "by another or others "authorized by them;" and no evidence having been led to show that they had done so in fact, the point resolved into a question of law, whether a general authority by a landlord in a lease to use the premises let for the purpose of "dyeing," or "operations "connected with dyeing," imported an authority to establish a dye-work which should prove a nuisance, or to conduct it so as to create a nuisance.

There is not between a landlord and tenant any such personal relation as subsists between a master and servant, and renders the master responsible for the wrongful deeds or negligence of his servant acting in his service, so as to cause such acts to be considered as the acts of the master who employs him. The matter depends on the construction of the lease, whether it can be held to import an authority to use the premises unlaw-

fully, and to the injury of a neighbour. Now, it is clear that without any express stipulation to that effect there is an implied condition in a lease with general powers, that these are to be exercised according to law, and in consistency with the rights of others.

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This rule is founded on general principles of law, and it has been given effect to in the Courts of Scotland, as was established in the case of Henderson and Thomson v. Sir Michael Shaw Stewart, decided by the First Division of the Court on the 23d June 1818.[1]

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[1] This case is not reported, but the following statement of it was given by the appellants, taken from the Session papers:—

By lease entered into in 1796 between John Shaw Stewart, Esq., of Greenock, on the one part, and Michael Bogle and others, their heirs and assignees, Mr. Shaw Stewart let to these parties a mill called the Easter Mill of Greenock, with a special power of erecting dams for the collection of water for the use of the mill, thus expressed, "with liberty "also to the said tacksmen and their foresaids to erect dams for collecting "the water in the burn of Crawford's Burn, or in the muirs of Greenock, "they always paying the damages to the tenants and possessors of the "adjacent lands occasioned thereby." This lease Mr. Shaw Stewart bound himself and his heirs "to warrant at all hands and against all "deadly, as law will." It appears to have contained no stipulations as to keeping in sufficient repair and security the dams which might be erected.

In virtue of the powers conferred by the lease, the lessees formed a reservoir in the muir of Greenock, belonging to Mr. Shaw Stewart, by the erection of an embankment or bulwark. The reservoir was about twenty feet deep in the centre, with a general average depth of from six to eight feet, and it covered three Scotch acres, so that it contained when full a very considerable mass of water. It was alleged that the embankment had been insufficient when first erected, that it had not been kept in proper repair, and that the landlord had never taken any steps to correct the negligence of the lessees. In the year 1806 the embankment burst, and the water in the reservoir, pouring down in a torrent, swept away several houses, and damaged many others. Certain parties, named Henderson and Thomson, proprietors of houses which had been thus

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The same principles have been given effect to in the English Courts; and in the recent case of Rex v. Pedley[1] the Court held the rule of the case of Prior v. Rosewell to apply, and Littledale, J., observed, "I see no difficulty "in this case. If a nuisance be erected, and a man pur- "chase the premises with the nuisance upon them, "though there be a demise for a term at the time of the "purchase, so that the purchaser has no opportunity of "removing the nuisance, yet by purchasing the reversion "he makes himself liable for the nuisance; but if after "the reversion is purchased the nuisance be erected "by the occupier, the reversioner incurs no liability. "Yet in such a case if there were only a tenancy from

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damaged, brought an action of damages for the loss sustained against the lessees, and also against the landlord, Sir Michael Shaw Stewart, who had now succeeded to the estate of Greenock.

In defence against this action Sir Michael pleaded, that "it was "implied in any permission that his predecessors granted, that the dam "should be sufficient, and kept in proper repair; and if it was not, the "reservoir was just as unauthorised by the defender as any act from "which injury or violence could result to the pursuers or the public."

The cause having come before Lord Gillies, his Lordship appointed parties "to debate as to the liability of Sir Michael Shaw Stewart." He afterwards ordered written pleadings, and ultimately his Lordship pronounced the following interlocutor:—"The Lord Ordinary having con- "sidered the memorial for the pursuers, with the memorial for Sir "Michael Shaw Stewart, baronet, defender, sustains the defences "pleaded for the said Sir Michael Shaw Stewart; assoilzies him from the "haill conclusions of the libel, and decerns."

This judgment was submitted to the reconsideration of Lord Gillies by a full representation for the pursuers, followed by answers for Sir Michael Stewart, but was adhered to by his Lordship.

The question was then carried by reclaiming petition to the Inner House, by whom the following interlocutor was pronounced:—"Edin- "burgh, 23d June 1818.—The Lords having heard this petition, they "refuse the prayer thereof, and adhere to the interlocutor of the Lord "Ordinary reclaimed against."

[1] Adolphus and Ellis's Reports, 822. See Cheetham v. Hampson, 4 Term Reports, 318, and the Cases there referred to.

" year to year, or any short period, and the landlord " chose to renew the tenancy after the tenant had " erected the nuisance, that would make the landlord " liable: he is not to let the land with the nuisance " upon it. Here the periods are short, so that there " has been a reletting, and that has taken place after " the user of the buildings had created the nuisance. " This is, therefore, a case in which the reversioner " is liable." The other Judges delivered concurring opinions.

Under the principle recognised in all these decisions, it seems clear that in relation to the present case Lord Jeffrey laid down the law correctly to the jury. The appellants had not themselves created the nuisance; they had not let the premises with a nuisance, or the manufactory which is said to have created it. It was not even alleged that the landlord had received a higher rent than he had drawn under the former lease while they were held merely as a bleachfield; and although the principal tenant had obtained a surplus rent, the sublease itself proved that he only contemplated the premises being used for the purpose of a print work. The pursuer made no attempt to show that a dye-work might not have been profitably carried on in the premises in question without a nuisance, and Lord Jeffrey accordingly states, that "the defenders " were entitled to a presumption in their favour" on this point.

The respondent can have no legitimate interest in seeking for a verdict against the present appellants. He has no conclusion that the landlord shall be interdicted from granting a lease of the premises in future

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with a power to use them for the purpose of dyeing. He does not even conclude to have him prohibited from letting them as a Turkey-red dye-work in time to come. Nay, he does not conclude to have the works stopped, but simply for an interdict against "discharging" into the stream madder-roots, &c. "whereby" it "may be polluted or rendered unfit for "domestic use or manufacturing purposes." He seeks no remedy, therefore, which he would not equally gain by a verdict against the occupying tenant. He would be secured against the discharge complained of, and that is all he asks; and it is even open to him, after he gets a verdict against the occupying tenants, to contend that this will entitle him to an interdict against the landlord also.

Respondent.—Under the circumstances in which the case was tried, and assuming the fact of nuisance to be established, the appellants were clearly liable in law to have a verdict returned against them; and the respondent, on the other hand, the nuisance being proved, was entitled to have an interdict in the terms concluded for in the summons.

The use of the water at the dye-works is to be assumed to amount in law and in fact to a nuisance. Whether by any practical remedy, and within the limits of any reasonable expenditure, it is possible to carry on the manufacture of Turkey-red dyeing in such a situation as that in which the works complained of are placed, is a speculative question into which it is unnecessary to enter. There is here an opus manufactum creating pollution and a nuisance on the

stream. It is a novum opus, neither acquiesced in by the lower heritor, nor sanctioned by prescription. The stream as it flows past the property of every heritor is no doubt liable to be consumed for ordinary domestic purposes, and to be turned to all lawful uses; but the stream of water is the common property of all the heritors through whose lands soever it flows. The upper heritor is not entitled either to divert its course or to diminish its quantity, excepting for fair and ordinary purposes, and is as little entitled to soil or pollute its quality. An heritor is not entitled to collect water and make it run down in a reservoir to suit his own convenience, nor can he carry water for the purpose of establishing any manufacture, without the consent of the opposite heritor. These are points fixed by express decision.[1] The limitations of the rights of the upper heritor as to pollution are regulated by the same principles.[2] The water, generally speaking, must be sent down to the lower heritor in the same quantity and of the same quality in which it flows into the lands of the upper heritor.[3]

'On looking at the sixth exception, it will be seen that the law laid down at the trial, with respect to the landlord and the principal tenant, never can be sanctioned. The learned Judge observed, that

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1 Lord Glenlee v. Gordon, 10th March 1804, Mor. p. 12,834; Ogilvie v. Kincaid, 24th November 1791, Mor. 12,824; Hamilton v. Eddington and Company, 5th March 1793, Mor. 12,824.

2 Miller v. Stein, November 1791, Mor. 12,823, Bell's Cases 334; Russell v. Haig, November 1791, Mor. 12,823.

3 Skene v. Maberly, 27th November 1820, Murray's Reports, vol. ii. p. 359; Miller v. Marshall, 8th November 1828, Murray's Reports, vol. v. p. 28.

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there was nothing to connect the landlord and the principal tenant with the nuisance, excepting the lease and the sublease, that the lease was silent on the subject of Turkey-red dyeing, and the landlord not liable for any nuisance which the tenant might create not authorized by the lease; and his Lordship proceeds, "that the question then was, whether it was "possible to carry on a dye-work on this stream at an "ordinary profit without committing a nuisance? "That the pursuer having led no evidence that this "could not be done, the defenders in this second "issue were entitled to a presumption in their favour, "and that if the jury were satisfied in point of fact "that a dye-work might be carried on in these pre-"mises without a nuisance, or that injury might be "prevented without much expense, then the landlord "was not liable for any negligence in the carrying on "of the work; and as there was no proof to connect "him or the principal tenant with the existing dye-"work, except the lease, they were not responsible "in law for the carrying on of that work, or for "any nuisance thereby occasioned." There is much error as well as great uncertainty in the law thus laid down. In the first place, it was not incumbent on the respondent to prove the negative that a dye-work could not be carried on in this stream without creating a nuisance. No dye-work had been carried on there before. The new experiment was tried under a lease granted by one of the appellants who drew the rent stipulated by that lease, and under the sublease granted by the other appellant, who drew the profit rent in respect of this new mode of occupation

constituting a nuisance. There was no restriction or limitation as to time, manner, or extent of manufacture imposed on the tenant or sub-tenant; and although in words the lease does not directly authorize pollution and nuisance, it authorizes, for the first time, and in a new situation, every operation connected with dyeing; and the operations actually carried on under authority of that lease amount in law and in fact to a nuisance. Why should there in such circumstances be any presumption in favour of the appellants? They were not protected by any prescription, acquiescence, or mode of using the stream. They attempted a new and unheard-of use of such a stream, by authorising all sorts of dye-works at the very sources where the pure water springs. Then, what sort of ground in law is it to proceed upon, that if a dye-work could be carried on without a nuisance, "or that injury might be prevented "without much expense," the landlord is not liable? What is much expense? And upon what principle of law is an upper heritor entitled to a new use of a stream for the purpose of a manufacture necessarily noxious to water, and to throw the expense of remedying the evils thereby created upon the lower heritor?

It is enough to subject the landlord, that nuisance is the probable consequence of the operation authorised by him, and for which he draws rent: Thus in the case of King v. Moore[1], 25th January 1832, certain premises were let for the recreation of pigeon shooting, and the effect of this was to bring various idle persons (called scouts) to the neighbourhood of the premises,

[1] Barn. and Adolph. vol. ii. p. 184.

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and who committed trespass on the adjoining grounds. The landlord was held liable to indictment, although he in noways sanctioned such resort, and derived no direct profit from these scouts. The principle upon which the judgment of the Court proceeded is thus expressed by Mr. Justice Littledale:—"It has been "contended, that to render the defender liable it "must be his object to create a nuisance, or else that "that must be the necessary and inevitable result of "his act. No doubt it was not his object; but I do "not agree with the other position, because if it be "the probable consequence of his act, he is answerable "as if it were his actual object. If the experience of "mankind must lead any one to expect the result, he "will be answerable for it." It cannot be doubted that the probable consequence of the establishment of the dye-works complained of was to cause that pollution and nuisance in the stream which ex concessis of the present argument actually exists. The liability of the landlord in all the consequences necessarily follows.

The argument of the appellants against liability for damage cannot affect the present question in the least, although, on the other hand, if the responsibility for damage does attach to them, it follows a fortiori, that they are bound to submit to an interdict against the wrongful use of the stream.

LORD CHANCELLOR.—My Lords, this was an action of interdict against continuing a nuisance to some water-course or grounds, and the suit was against Hamilton the landlord, Arthur who was the immediate lessee, and Macdonald and others who were the actual occu-

piers of the premises in question. The Court of Session directed two issues to be tried: the first issue was, whether Macdonald, that is the occupying tenant, did, by certain operations carried on upon the premises, wrongfully pollute and spoil the water, to the nuisance of the pursuer; the second issue was, whether Hamilton or Arthur, by themselves, or another or others authorized by them, did wrongfully pollute and spoil the water to the nuisance of the pursuer. The fact of nuisance is the same upon both issues; and if the jury found in the negative, there must have been a verdict for the defendants upon both; but if they found in the affirmative upon the first issue, Hamilton and Arthur might have obtained a verdict upon the second, if they could have proved that the act which constituted the nuisance was solely the act of the tenant, and in no manner authorized by them.

Lord Jeffrey, the Judge before whom those issues were tried, in describing what constituted a nuisance, described it in terms which the Court of Session have thought not to be properly applicable to the subject, and the Court of Session directed a new trial upon the issue, and upon that there is no question before your Lordships. He also addressed the jury with respect to the second issue, namely, that issue which affected the liability of the landlord and of the immediate lessee; and upon that issue the summing up was as follows, which constitutes the sixth exception taken upon the bill of exceptions:—"and the said Lord Jeffrey "did further direct the jury, in point of law, that with "respect to the liability of the landlord and principal "tenant under the second issue, assuming that there "had been actual nuisance proved, as there was nothing

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" to connect these defenders with the supposed nuisance " but the lease and sub-lease granted by them respec- " tively, there was no ground in law for holding that " they or either of them had authorized or were " answerable for that nuisance: That the other defenders, " the persons in occupation, did not stand in relation " of agents or servants of the landlord or principal " tenant, and that although they might have misused " the manufactory the landlord was not liable for a " nuisance by the tenant in occupation unless that " nuisance had been sustained by him: That as in this " case the lease said nothing as to Turkey-red dyeing " but simply related to dyeing, which did not mean the " establishment of any dye-work poisonous to the water, " this did not imply a license to carry on the dye-work " in such a way as to be a nuisance. The question then " was, whether it was possible to carry on a dye-work " on this stream, at an ordinary profit, without com- " mitting a nuisance? That the pursuer having led no " evidence that this could not be done, the defenders " in this second issue were entitled to a presumption " in their favour; and that if the jury were satisfied, in " point of fact, that a dye-work might be carried on in " these premises without a nuisance, or that injury " might be prevented without much expense, then the " landlord was not liable for any negligence in the " carrying on of the work; and as there was no proof " to connect him or the principal tenant with the " existing dye-work, except the lease, they were not " responsible in law for the carrying on of that work, " or for any nuisance thereby occasioned." The result was, the jury found a verdict in the negative upon both the issues.

Now, my Lords, that part of the summing up of the learned Judge which formed the subject of the four first exceptions, which were allowed by the Court, and with respect to which there is no appeal, was calculated, in my opinion, to lead the jury by misdirection in point of law, as afterwards was held by the Court of Session, to negative the fact of nuisance altogether. As to that part which related to the landlord's liability, the learned Judge told the jury that though they should find that there was a nuisance, yet as the lease only related to dyeing, and there was nothing else to connect the landlord with the nuisance, he was not responsible if the jury should be of opinion that a dye-work might be carried on at the ordinary profit without committing a nuisance, or that injury might be prevented without much expense. Upon the four first exceptions the Court appears to have entertained no doubt but that the direction was wrong, and accordingly ordered a new trial; but they doubted upon the sixth, and by a majority of three to one they ordered a new trial upon the second issue. Lord Gillies and Lord Corehouse seem indeed to have proceeded much upon the ground that the landlord had, by his defence, complicated himself with the case of the tenant, by denying the existence of nuisance. But to negative the fact of nuisance was a necessary part of this case, because success upon that issue would have entitled him to a verdict, without entering upon the question of his liability as landlord; but he, having two grounds of defence, was by no means bound to rest upon the latter only. Besides which, if his having so pleaded ought to have led to such a conclusion, the first issue ought to have been made to apply to both landlord and tenant; whereas, by directing

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the second issue, it seems to have been assumed that the landlord might have a defence, although the fact of the nuisance should be established. The two issues having been directed, it does not appear to me that those considerations could operate upon the question of the propriety of the summing up of the learned Judge; and upon the trial of the bill of exceptions, the learned Judge upon the second issue put the question to the jury, upon the supposition that the nuisance had been established. But that was not what the jury had to try—at least not all which they had to try—upon the second issue; they had to try the fact of nuisance, and also whether the landlord had authorized it. Had they found either in the negative, there must have been a verdict for the defendant; but if, not regarding the direction of the learned Judge as to the liability of the landlord, they thought that he had authorized whatever the tenant had done, yet, consistently with the learned Judge's direction upon the question of nuisance, they could not have found for the pursuer. His direction, therefore, upon the question of nuisance necessarily entered into his direction upon the second issue; and if he was wrong upon that, the error may have led to the verdict upon the second issue. The jury might well have said, adopting the learned Judge's direction as to the landlord's liability, We find that the tenant might have carried on his business so as to avoid what the Judge has described to us as a nuisance in point of law, without much expense, and obtaining a reasonable profit; but they might have come to a very different conclusion if they had contemplated the fact of nuisance, not as the learned Judge had described it to them, but

as the Court of Session thought it ought to have been described. Therefore, if his direction as to the landlord's liability had been altogether correct, I should have thought a new trial upon the second issue must necessarily have accompanied a new trial upon the first.

But then the question remains, whether the direction of the learned Judge as to the liability of the landlord can be maintained? The lease to Arthur is for the purpose of bleaching, dyeing, or printing, or any other operations connected with dyeing, bleaching, or printing. If the operations connected with bleaching, dyeing, or printing would, in the ordinary course of business, create a nuisance, is the landlord to be irresponsible because the tenant might, by possibility, have avoided the nuisance, and yet have obtained a reasonable profit, or have prevented the injury without much expense? There is no such distinction to be found in the doctrine laid down in The King v. Moore, in 2 Barnwall and Adolphus, p. 184, or The King v. Pedley, in 3 Neville and Manning, and no author in Scotland is cited to support the rule as laid down by the learned Judge. How far what actually took place is to be considered an operation connected with bleaching and dyeing or printing, according to the terms of the lease, was a question of fact to be determined by the jury, and one of the highest importance in determining the liability of the landlord; but the learned Judge told the jury, that there being nothing but the lease to connect the landlord with the nuisance, there was no ground in law to hold him responsible.

It was argued that the Court of Session, having allowed the bill of exceptions upon the first issue, were

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bound to direct a new trial of the whole, including the second issue. It does not appear to me necessary to enter into that question; because, whether the rules of courts of law in this country upon bills of exceptions, or the rules of courts of equity in directing issues, ought to be the rules of the Court of Session, it appears to me clear, that upon either supposition a new trial upon the second issue would have been proper; first, because the erroneous direction upon the question of nuisance necessarily affected the decree upon the second issue as well as upon the first; and, secondly, because the direction as to the landlord's liability restricted the landlord's liability within limits which I conceive cannot be supported.

I therefore move your Lordships that the interlocutor of the Court of Session be affirmed.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutor, so far as complained of, be and the same is hereby affirmed.

RICHARDSON & CONNELL—ARCH. GRAHAM, Solicitors.