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counter-issue, and had there been any evidence of an assault by the pursuer there would have been an end of the case. This question turns on what in law is an assault; and I state to you that there must be a physical bodily act; and that words, or coming forward, or furious looks, do not amount to an assault.

Your verdict must therefore be against the defender on this point. The next question is, whether he struck the pursuer? There was evidence on both sides, and the witnesses agree as to the striking, so you have only to consider the damages, which are entirely for you. They ought not to be given as a punishment, but as a moderate and just indemnification for the injury.

Verdict—"For the pursuer, damages L.60."

Hope, Sol.-Gen. and *Maitland*, for the Pursuer,
Jeffrey and *Cockburn*, for the Defender.
(Agents, *Hotchkis* and *Meiklejohn*, W. S., and *D. & A. Blackie*, W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER, PITMILLY, AND CRINGLETIE

1826, July 13.

Finding for the defender in a question as to the diminution of

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SUSPENSION by the tenants of a flint mill of a charge given for rent, on the ground that the

proprietor had allowed the conterminous heritor to divert the water from the mill. There was also an action of relief and damages by the proprietor against that heritor.

the power of a flint-mill by the alleged abstraction of water.

ISSUE.

The issue contained an admission of the lease and warranty of the mill by the predecessor of the defender. The question then was,

" Whether the stream of water which was em-
" ployed in driving the said mill, when it was
" let to the pursuers in April 1812, has been
" since that time so lessened in quantity, or di-
" verted from the said mill, by William Aitchi-
" son of Drummore, the conterminous heritor,
" as to diminish the power of the said mill in
" performing the work which it was capable of
" performing at the time the lease was granted?
" And, Whether the diminution or diversion
" of the said stream was caused and continued
" by the negligence, or by the permission of
" the defender, to the loss and damage of the
" pursuers?"

In the action of damages the issue was,

" It being admitted that the pursuer is pro-
" prietor of the lands of Prestongrange, and of
" the flint-mill situate at the foot of Preston-

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" grange avenue, possessed by Robert and " George Gordons;

" Whether the defender, without the con- " sent or permission of the pursuer, did, subse- " quent to the month of April 1812, divert " from the said mill the stream of water belong- " ing to the same, or did so lessen the quanti- " ty of the said stream as to diminish the pow- " er of the said mill, to the loss and damage " of the pursuer?"

Before proceeding to trial it was agreed that both cases should be tried by the same jury.

Hunter opened the case for the pursuers, and stated the facts, and described the different sources of the mill-stream from a plan, a copy of which was given to the jury. That the damage was more than the rent; but, even if it were not so much, he was not bound to pay rent for a useless mill.

It being admitted by the defenders, that complaints were made by the pursuer, it is incompetent to give in evidence the letters containing these complaints.

It was proposed by the Gordons to call for a letter written by them to Sir James Suttie.

Cockburn objected to the production, but admitted that they complained.

LORD CHIEF COMMISSIONER.—You cannot get your own letter to prove facts, or produce an impression, or to prove the manner in which

you made your complaint. You have called for it for the purpose of proving that you complained, but that is admitted.

Though the pursuer fails in a material part of his case the Court has no power to enter a nonsuit.

At the close of the evidence for the pursuer, his Lordship suggested that there was a defect in the evidence, which, had the case been in England, would have produced a nonsuit: That there was no evidence of the power of the mill at the time it was let, the only evidence being of the diminution of the water.

Mr Murray admitted that two of the witnesses got confused, and that the precise amount of damage was not proved; but contended that the loss of the subject let was proved. On the other side, Mr Cockburn said, the question does not turn on the abstract proposition that the water was diminished, but there are three facts which must be made out: That the stream was diverted; that it was by Aitchison; by consent of Sir James Suttie. The proof is of operations by Aitchison in 1822; and it is proved that before that year no work was done at the mill.

LORD CHIEF COMMISSIONER.—The difficulty in this case is, that the issue is as to the power of the mill. It is said the power is taken away,

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but the power at the date of the lease is not proved. No doubt it is true as an abstract proposition, that, if the water employed in driving it is diminished, the power is diminished. But then the question is on the power, and that ought to have been proved.

This is a great example of the necessity of the power to nonsuit being introduced into this Court; but I have here no power thus to withdraw the case from the jury, which would enable the party to bring his case in a better form. If it goes to them on the merits, the verdict must settle the case.

It is in evidence that part of the water diverted by Aitchison was his own, and in the circumstances of this case it would have been better had the tenant not withheld his whole rent, and had the agent for Sir James agreed to a deduction.

Cockburn, in opening the case for the defender, said, The pursuer was bound to prove that water was taken from the stream; that it was so taken by Aitchison; and that it was by consent of the defender. But he had failed in proving that a drop of water was taken from the stream. The water might be diminished, but that was by draining and other operations, over

which the defender had no control. The only water which is not allowed to flow into the stream is that raised by a steam-engine by Aitchison; and I say to the jury in common sense, and I say to the Court in law, that he is not bound to work this engine to supply the water, nor is he bound to make it run in one direction rather than another.

LORD CHIEF COMMISSIONER.—As this case is to be decided on its merits, I am glad that it underwent some discussion before the present address; for there is matter both for the Court and the jury. This issue arises out of a common transaction, a lease, in which the tenant withholds his rent, alleging that the landlord failed in what he warranted.

Here your duty is performed by taking the views of law, and construction of the issue from the Court, and considering the fact, which is more peculiarly for you, and then finding generally for the pursuer or defender. There are in fact two issues, and these may branch into particulars; but the question to consider is, Whether what was warranted in 1812 has been lost by the negligence of the defender?

You must then consider whether it is proved that the water was taken from the running

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stream; for a running stream must run in the same quality and quantity as in time past; but I cannot lay it down as a general rule, that a proprietor of higher lands is not to drain them, or that he is bound to allow the surface water to flow in the same direction as formerly.

As to the water from the distillery, I hold that no landlord could be bound to warrant that the water collected there should be thrown into the strean. To incur a liability from negligence there must have been an obligation to care and diligence on the part of the defender; and to subject him for granting permission to do any thing there must have been a power to prevent it being done. In the present case there was no such obligation or power in the defender.

With respect to the water from the coal-pit, it appears that this was water raised on the land of Mr Aitchison by means of machinery, and there was no obligation on him to continue to work it, or to make the water flow into the stream. If the water was produced by the operation of nature, by a spring or a coal level, it is a material question whether that must not be allowed to flow in the same manner as heretofore; but when it is produced by the operation of man, by machinery, I think it impossible to

say that it was part of the ancient stream which the defender was bound to warrant.

There is evidence that the water is insufficient for the mill; but is there any evidence of water having been abstracted? The evidence shows that there was a deficiency of water prior to the lease, and that no flint was ground at the mill in 1812; and the issue is, whether the water is diminished, *so* as to lessen, &c. To support this issue the pursuer ought first to have proved the work it could have done in 1812; but there is no such evidence. If I am wrong in the construction of the issue, there is a remedy in the Court of Session. On the evidence I think there ought to be a verdict for the defender.

Verdict—For the defender.

In the case of Suttie *v.* Aitchison, his Lordship said, that of course Mr Aitchison must go clear out of Court; and the case was settled, the pursuer consenting that the defender should have the whole benefit he would have derived from a verdict in his favour.

J. A. Murray and *Hunter*, for Gordons.
Cockburn and *Dundas*, for Suttie.
Jeffrey and *Sandford*, for Aitchison.