is put, the question is incompetent But if a bill of exceptions is taken on the ground of our rejecting the question as now put, the case will not be fairly before the Court to which it is taken.

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(After some delay the parties adopted the suggestion given by the Court, and the case was settled by a private arrangement.)

Jeffrey and *Cockburn*, for the Pursuers.
Moncreiff, D. F., Sandford, and for the Defenders.
(Agents, *Kenny & Hunter*, W. S. and *John B. Watt*)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

HART v. TAYLOR.

1827. July 19.

Finding for the defender in a question of nuisance.

THIS was an action to have it found that the manufacture of black ash by the pursuer was a nuisance, and as such ought to be stopped.

DEFENCE.—The manufacture is not a nuisance, not being prejudicial either to health or vegetation. The pursuer is barred from challenging it by acquiescence.

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ISSUES.

" It being admitted, that the pursuer is pro-
" prietor, and has been proprietor since 1807,
" of a house, garden, and field, situate near the
" west end of the village of Blackness, in the
" county of Linlithgow,—and that the defender
" is proprietor, and has been proprietor since
" 1813, of a piece of ground to the westward
" and southward, and immediately adjoining to
" the property of the pursuer.

" It being also admitted, that, upon the pro-
" perty of the defender, there are certain build-
" ings in which black ash, mineral alkali, and
" other substances, were, and are manufac-
" tured:

" Whether, during the years 1813, 1814,
" and 1815, and subsequent thereto, there
" arose, and continued to arise from the said
" manufacture, great quantities of smoke, and
" certain noisome, offensive, noxious, or un-
" wholesome vapours, or stenches, which were
" diffused or spread over the property 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 loss, injury,
" and damage of the pursuer? Or,

" Whether the pursuer acquiesced in the
" erection of the said buildings, and the carry-

"ing on of the said manufacture by the de-
"fender?,

Maconochie opened for the pursuer, and said, He would prove this manufacture injurious to the health both of animals and vegetables, and that it was in a situation to be a nuisance to the pursuer's house.

When a witness was called on to produce branches of trees and shrubs cut from the pursuer's garden,

In a question of nuisance a witness not allowed to produce branches cut from shrubs in the neighbourhood.

Jeffrey.—It is contemptible to attempt to produce an undue impression by producing branches cut a week ago.

Moncreiff.—It would be important if I had a branch cut at any time, that showed the effect of this manufacture.

LORD CHIEF COMMISSIONER.—It appears to me very doubtful, the production of a thing which has an uncertain appearance. The object is to get a description of the effects produced, and you may have the fullest description without these being produced. If you are to have it, you must go into great detail as to the day they were taken, the distance from the defender's works, and other circumstances. This

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is of so doubtful a nature, that it appears to me that justice will be better attained by description; and I am always doubtful of admitting any thing that may give a false colour.

Incompetent to examine a person employed by the party to inquire after other witnesses.

It being stated as an objection to another witness, that he had been employed by the pursuer to inquire after other witnesses, the Dean of Faculty said it was not his intention to examine him in the cause, but as to some specimens of the manufacture which he had taken, and which the agent might have taken.

Jeffrey.—He was not a necessary witness; and it is only on that ground that agents are admitted to prove the execution of deeds. Carmichael *v.* Tait and Fraser, 7th December 1822.

Moncreiff, D. F.—The fact is, the specimens were taken by desire of the defender's agent, and were got from the defender. The objection to Mr Gibson-Craig in the case quoted was interest as agent.

LORD CHIEF COMMISSIONER.—Neither the defender nor his agent knew this to be the agent of the pursuer; and as we do not sit here to make, but to dispense law, we must reject the witness.

Lords Cringletie and Mackenzie expressed a concurrence in this opinion, and on it being suggested by the Dean, that in one case a pardon to a criminal was granted on the ground that his agent had been rejected, Lord Mackenzie observed, that it might be a good ground for a pardon, that, by the mistake of an agent, the party had been deprived of a fact.

A witness was examined in presence of two medical gentlemen as to the process carried on in the manufactory, that they might describe the nature and properties of the gases which would be produced in the course of the manufacture.

In a question of nuisance, incompetent to ask the reason assigned for not renting a house in the neighbourhood.

It was proposed at one time to let the pursuer's house as a villa; and a witness was called to prove that two persons had looked at it with the view of taking it; and an objection was sustained to the question, whether they assigned any, and what reason for not taking it?

Jeffrey opened for the defender, and said, —That this was a case of vital importance to the defender and the manufactures of the country: That this was the weakest case he had ever seen. A manufacture being disagreeable does not render it a nuisance; and it cannot be removed, unless it is carried on from malice, or

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is to an intolerable degree. It must destroy property, and injure the health, or be to such a degree as to render life intolerable. In this case, the facts clearly prove an acquiescence by the pursuer, which would have been good against the most aggravated nuisance. In a late case, the Court of Session held it sufficient if the party saw the operations, and did not object.

Moncreiff, D. F. in reply, contended, That the case of the pursuer was proved, and that no defence had been made out. The pursuer was a minor at the time the buildings were erected, and his tutor was a brother of the defender.

The question is, whether this was a nuisance at the date of the action in 1826? It is not necessary to constitute a nuisance, that it should render life intolerable. It is sufficient if the production of the work is of a kind and quality that has a natural tendency to injure trees and plants, and that in fact it does injure them. The defender did not make a fair use of his property. We have proved, in terms of the issue, that noxious vapours arose to the damage of the pursuer.

Ayton *v.* Douglas, 1st July 1800, Mor. App. Ayton *v.* Melville, 19th May 1801, Mor. App. Property.

As to acquiescence, it is a plea not known in our law till lately, and is giving weight to acts by the wrong doer against the other party, in-

stead of acts by the other party, which constitutes homologation. The case referred to is of a totally different nature from this case, in which there could not be acquiescence, as the defender was tenant of the pursuer's house; and he could not establish a servitude against a property of which he was tenant.

LORD CHIEF COMMISSIONER.—In this case I shall not go into a detail of the evidence, or any discussion on a point of law. When I have mentioned the points to which your attention should be directed, I am persuaded it will turn out to be a question of fact. This is a manufactory which has existed for ten or twelve years in its present form, and with its present object. In the issue there are two questions; and if I agreed in the observations now made as to acquiescence, I would withdraw the case from you; but as there is no decision which would warrant me in this, I send the case to you; but if you find for the defender on the ground of acquiescence, I wish you would do so in express terms, as that will raise the question.

In a question of nuisance, the first point is, whether the product of the work is noxious or unwholesome; but though it may not be absolutely noxious, still if it renders the enjoyment

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of life substantially uncomfortable, either in the pursuer's house or grounds, it is a nuisance.

The pursuer has not produced any evidence of this having been noxious to animal life, and its effects on animals rests on the opinion of the medical gentlemen; and, on the other side, you have persons living only fifty yards farther off than the pursuer who suffered no injury. The evidence was limited to vegetables. This still leaves the question of, whether it renders life substantially uncomfortable? and if so, you will find for the pursuer, but if not, then for the defender. Every question of this sort is one of degree, and must depend on the evidence. It is not every trivial inconvenience; it must be substantial. This may be not merely by the fumes entering the rooms of the house, but by their injuring the fruit, vegetables, and milk and other productions. You must weigh the evidence of the different witnesses, and consider the circumstances in which they examined the premises, and make up your minds whether the injury to the trees, &c. was done by the work, and whether it was to such a degree as to render life substantially uncomfortable, and if it was not, you will on this point find for the defender.

The next point is the smell; and no doubt

this may be to such a degree as to make out the case; but on this also there is contrariety of evidence.

If, on the first issue, you find for the defenders, it is unnecessary to say any thing as to the second; but as I cannot know your opinion on this, I shall state our views on the subject; for whether it is a question of fact, or a direction in law, it may be brought under consideration of the Court. The leaning of my mind is, that this is a case for acquiescence. There is, however, a material difference between this and the case which has been mentioned;—it was a case where there were two proprietors; here there is a proprietor and tenant.

This is a case for acquiescence, not homologation; and as to the erection of the buildings, the pursuer cannot be said to have acquiesced in that, as he was then so young; but with respect to carrying on the work, he is in a different situation. I shall not therefore say whether a tutór or curator may acquiesce. But the pursuer was of age in 1818; and though he was in England and abroad, still he was frequently at his house when it was occupied by the defender, the manager of the work, and was in a situation to say to him that he intended to stop the work. Acquiescence does not require any specific time,

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but it is to be drawn from the facts proved. It came out in evidence, that, within two months of bringing this action, and before he made any complaint of the work, he employed an upholsterer to put up delicate furniture in his house, which, if it is not an act of homologation, goes far to prove that the pursuer did not consider this a nuisance.

Verdict—For the defender.

Dec. 21, 1827. Circumstances in which the expenses caused to the pursuer by a preliminary defence were not given.

When expences were given to the defender, *Maconochie* moved, That the expence caused to the pursuer by a preliminary defence should be paid by the defender.

More objected, and said, That the title produced by the pursuer was defective; but the case being strong on the merits, this objection was not insisted on. It never was discussed; that could only be done in the Court of Session.

Maconochie.—The fact is important, that there was a detailed objection to the title which was not abandoned till we were fully prepared to discuss it, and we are entitled to the expence of making searches and feeing counsel.

LORD CHIEF COMMISSIONER.—We could not have discussed the question. When there

are dilatory defences, the only act in this Court is to remit the case to the Court of Session.

GALL, &c. *v.* WATT.

LORD MACKENZIE.—The party had no right to be fully prepared to discuss the question, as we could not decide it. But, looking to the claim, I am not sure if a party is entitled to subject his opponent in the expence of clearing up his title, as he may have profited by the investigation; but this is not the ground on which my opinion is founded.

Moncreiff, D. F., and *Maconochie*, for the Pursuer.
Jeffrey and *More*, for the Defender.
(Agents, *John Tait Jun.* W. S. and *George M'Callum*, W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

GALL, &c. *v.* WATT.

1827. July 20.

Finding that a creditor did not privately accept of a gratuity for giving his concurrence to an offer of composition by his debtor.

AN action of reduction of a bond of caution for a composition offered by a bankrupt, on the ground that the assent of a creditor had not been fairly obtained; and an action by that creditor for payment of the composition.

DEFENCE in the reduction.—There was no