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the 20th November, on a motion to retransmit them to the Court of Session; and on the 27th his Lordship said, It appears to the Court that these cases fall under the provision of the statute, as to the remit of untried cases, and they are sent to the Court of Session that the liability of Magistrates in such circumstances might be ascertained. *

Jeffrey and *Donaldson*, for the Pursuer.
Moncreiff, *D. F.*, *Forsyth*, and *Hosier*, for the Defenders.
(Agents, *Wm. Wotherspoon*, S. S. C.—*Wm. Waddell*, W. S.)

GLASGOW.

PRESENT,

THE LORD CHIEF COMMISSIONER.

1828. Nov. 8.

MILLAR v. MARSHALL.

A declarator to have it found that a calico printing manufactory was a nuisance.

AN action of declarator for the purpose of stopping a manufactory for printing calico as a nuisance.

DEFENCE.—A denial that any thing rendering it a nuisance issued from the work, or that it was the cause of the pollution of the stream; and that it had been acquiesced in for thirty years.

Nov. 12, 1829.

* The Court held the proceedings [of the Magistrates] illegal and irregular, and again remitted the case to the Jury Court.

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ISSUES.

" It being admitted that the pursuer is pro-
" prietor of the lands of Netherfield or Bran-
" drumhill, Lightburn, Over Carntyne, Wester
" Mailing of Wester Cunshlie of Provan, and
" part of the village of Lightburn ;

" It being also admitted that a stream of
" water, called Lightburn, runs through the
" said village, and a part of the said lands, and
" forms the boundary of other parts of the said
" lands ;

" It being also admitted, that, on the 15th
" of March 1824, and prior thereto, there exist-
" ed upon ground situate higher up the said
" stream, a certain manufactory, the property
" of, or possessed by, the defenders ;

" Whether, on the said 15th March 1824,
" and prior thereto, or on the said 15th March,
" and subsequent thereto, the defenders, by
" bleaching, dyeing, or other operations carried
" on by them in the said manufactory, did cause
" certain matter to pass into the said stream,
" whereby the water of the said stream is pollut-
" ed and spoiled to the nuisance of the pursuer ;
" whereby the said property of the pursuer was,
" on the said 15th day of March 1824, and prior
" thereto, or on the said 15th day of March, and
" subsequent thereto, deteriorated, and the pur-

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"suer, and the inhabitants of the said village,
"incommoded and annoyed in the enjoyment of
"the said property and houses, to the loss, in-
"jury, and damage of the pursuer? Or,

"Whether the pursuer or his predecessors
"did agree to, or acquiesce in, the erection of
"the said manufactory, and the passage of the
"said materials into the said stream, or did ho-
"mologate and sanction the same?"

Hope, Sol.-Gen. opened the case for the pursuer, and stated the facts, and what he considered as sufficient to warn the defenders that the predecessors of the pursuer did not acquiesce in the erection or continuance of the work—that the work was formerly carried on to a small extent—and that the tenant had been ordered by the Sheriff to carry off the foul water by a roan. A degree of inertness may cut off the claim of damage, but will not warrant the continuance of a nuisance. The water was formerly peculiarly good, and is now unfit for man or beast.

Arrot *v.* Whyte, 4 Mur. Rep. 161.

Jeffrey, for the defender.—This is a clear case on the acquiescence, as the pursuer allowed large sums to be laid out on the works. It is unnecessary to say much on the law of nuisance, which is that of common sense, and de-

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pending on circumstances. Except where health or life is injured, nuisance is a question of circumstances and degree; and this is a work in a situation where it is no nuisance. Much shorter acquiescence than this, and mere looking on without doing any thing, has been held sufficient; but here the party gave his land as gardens for the men employed at the work. In 1799 an agreement was entered into, by which the dirty water was to go into the burn, and pure water was to be conveyed in a roan to a brewery on the pursuer's property. All the complaints mentioned were for breach of this agreement, which sanctioned what is now done.

Aiton *v.* Douglas and Melville, May 19, 1801.

It is said the work has been increased.—If that is the fact, they can only put down the excess, and must show at what time it took place, which they have not done.

LORD CHIEF COMMISSIONER.—I am satisfied that it will turn out, that the questions on both issues, are for you, the jury, though I do not say your findings on them will not include some proposition in law. In case of a stream passing through the lands of different properties, each proprietor is entitled to have the water running through his land in the same quantity and quality, and in the same time, as it has ever been,

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and any thing which injures that right may be treated as a nuisance, provided the fact of injury is made out. All the proprietors are entitled to use the stream for the ordinary purposes of life, and if that injures the right of another he has no redress; but if the pollution of a stream arises not from the natural use of the stream, the individual so using it is liable, unless the other has submitted to the use made of it. It is material in this case that the pollution arose from an act of an individual at a much earlier period than the complaint. But if you are satisfied that the stream was polluted, and that it was of the nature of a nuisance, and not acquiesced in, you must find for the pursuer.

This stream appears formerly to have been pure, and to have been applicable to agricultural and culinary purposes; but it does not appear to have been the only water employed for these purposes, as it was so small that it was dried up in summer; but still the law of running water must apply to it.

The conclusion for damage in the first issue is a mistake, as this is a case of declarator, but, in considering the evidence, you must make up your minds whether this is polluted to the extent of a nuisance, and you must attend to the fact, that it is not spoiled during the whole year,

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and there is contradictory evidence as to whether the pollution extends as far as the village. The general tendency, however, of the evidence is, that in drought and in summer it is polluted even below the village, and were this a question of damage, the injury at this place would be a material ingredient.

This being the state of the stream, the question is, by what acts it came into this state, and whether the acts have been acquiesced in? The question of acquiescence may arise in a court which judges of law and fact, but here it must be decided by the jury. The defender, who must make out this, gives no evidence, but rests his case on what he has got on cross-examination from the witnesses called by the pursuer in anticipation; and it is for you to say whether he has made it out by the documentary evidence or cross-examination of the pursuer's witnesses. The evidence of acquiescence and non-acquiescence, and the evidence of the extent of the works (which his Lordship stated,) at different times, requires most serious consideration. The view taken by Mr Jeffrey, that it is only the excess which the pursuer could put down, would lead to specific findings, which it would be very difficult to make out in the loose state of the evidence.

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The complaint here is by a proprietor of land that this stream is rendered unfit for the purposes of living, and for watering cattle; but one great branch of the evidence was proving complaints by the tenant of a brewery, that the roans for conveying pure water to the brewery were not kept in order. Had my attention been sooner drawn to it, I would have held this *res inter alios.* The complaint was of a different nature from the present; and can it be said to be an interruption by the proprietor?

A witness was called to prove that a defender had said he knew the pursuer did not acquiesce. An admission by a party is the strongest evidence, but proof of a common observation by a party is the weakest, and you must consider whether this is proved to have been such an admission.

It is established that the pursuer resided near the spot, and ought to have been acquainted with what was doing; and, on applying your good sense to the whole facts and circumstances, and taking my observations so far as they appear to you good, you are to find for the pursuer or defenders. If you are of opinion that the stream is deteriorated, and that it has not been acquiesced in, then you will find for the pursuer. If the case rested on the first issue,

I would think the finding should be for the pursuer; but if, on the whole facts and circumstances, you are satisfied of the acquiescence, then you will find for the defenders.

Verdict—" For the pursuer."

Feb. 12, 1829.

A rule to show cause why there should not be a New Trial was granted, but after hearing counsel the rule was discharged.

Moncreiff, D. F., Hope, Sol-Gen., and *Millar* for the Pursuer.
Forsyth and Jeffrey, for the Defenders.
(Agents, *John Meek,* W. S. and *William Wadell,* W. S.)

NEW TRIAL.

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

1829.
Jan. 8 and 9.

WIGHT v. LIDDEL.

Finding for the defender on a question of demurrage and damages.

THIS case was originally tried on the 21st July 1827, (See 4 Mur. Rep. 325,) and a verdict returned for L.2021, and L.334 for breach of bargain.

Jeffrey opened for the pursuer, and stated