

WALKER
v.
ARNOT.

Judge who tried the cause. As in this case I am ready to grant such a certificate, we are of opinion, that costs ought to be given.

On a subsequent day, on a motion to approve of the Auditor's report, it was proposed that part of the expence should be struck off, on account of the smallness of the damages.

LORD CHIEF COMMISSIONER.—In this Court the damages are left to the Jury, and they have in this case found damages. The present question does not depend on the amount, but whether it was a fit case for an action. I formerly stated, that it appeared to me that the action was properly brought; and therefore, unless there is any objection to the report by the Auditor, we must approve of it.

PRESENT,

THE THREE LORDS COMMISSIONERS.

1820.
Nov. 27.


SKENE v. MABERLYS.

AN action of damages for a nuisance.

DEFENCE.—A denial that a nuisance existed.

ISSUES.

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“ Whether, subsequently to the month of
 “ August 1815, the defenders, by bleaching
 “ and other operations carried on in part of
 “ the lands of Rubislaw, held in lease by the
 “ defenders, did pollute and spoil the water
 “ of the burn or rivulet of Rubislaw, so as to
 “ injure the quality of the water in passing
 “ through that estate, (the property of the
 “ pursuer), to the injury and damage of the
 “ pursuer? Or, Whether the said pursuer
 “ did, by himself or his agents, agree to, or
 “ acquiesce in, the use made of the said wa-
 “ ter by the defenders; and did witness, with-
 “ out challenge, the construction of expensive
 “ works by the said defenders, on the faith of
 “ such acquiescence? And to what extent
 “ he did so agree or acquiesce?

“ Damages laid at L.7000.”

This case was tried at Aberdeen, and a ver-
 dict returned for the defender on the first Issue.

1820.
Nov. 29.



A motion had been made for a new trial;
 and this day LORD GILLIES read the report
 of the trial, and stated generally, that the im-
 pression on his mind was, that the pursuer
 had made out his case, and that the verdict

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was not what he anticipated. That in his charge to the Jury he had said, that, as no damages were proved, the Jury might give small damages; the object being not to get damages, but to ascertain the right.

Jeffrey shewed cause against the rule for a new trial, and stated—The ground upon which this application is made is a very delicate one. The Court will not trench on the province of the Jury, and balance the evidence.

LORD CHIEF COMMISSIONER.—It is of consequence that it should be understood, that the Court never thought of balancing the evidence.

Jeffrey.—There was here a Special Jury and a view. The viewers are witnesses, and ought to overpower all other evidence. The Jury did not do any thing palpably indefensible.—Grant on New Trials, 176; *Hankey v. Trotman*; 1. Black, Rep. 1. It is admitted that the stream is polluted; but the question is, if this was done to the injury of the pursuer, and without a title. Our notes shew—

LORD CHIEF COMMISSIONER.—The recollection of the Judge may be assisted by

counsel, but *his* recollection and notes must be decisive.

Jeffrey.—The works have existed for 50 years; and even if we had made a slight addition to them, this is no ground for damages. The Court of Session held so to-day in the case of Dalrymple of New Hailes.

The evidence was contradictory on several points, though I don't think irreconcilable; but the Jury are the proper judges of evidence. At one time the works were defective, and did pollute the water; but that was settled by correspondence at the time; and it is almost admitted, that now we are most careful.

Gordon.—I admit the Court are strict in granting new trials; but if a verdict is in common sense contrary to evidence, a new trial must be granted. The Jury, I admit, were perfectly respectable, and, if they kept within law, we cannot touch the verdict. I agree, in general, as to what has been said on the cases; and if there is cross-swearing, the Judge will not interfere. In this case all our witnesses agreed that the stream was polluted by vegetable matter, and the other party admit it. The farm was let for agricultural purposes.

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LORD CHIEF COMMISSIONER.—This case was tried before Lord Gillies, and a motion is made to set aside the verdict, as contrary to evidence. The Court have thought it right to take time to consider, both from the importance of the case, and with a view to the general principle on which it must be decided. The Court is deeply impressed with its importance; and particularly so, as our decision is final, there being no other judges to whom the case can be carried by appeal, if we should refuse the application; but if we grant the new trial, the effect is merely to subject the case to the review of another Jury. Jurisdiction is given us in this matter by § 16 of the stat. 59. Geo. III. c. 35; and under the 6th section of the statute 55. Geo. III. c. 42, it was competent to apply for a new trial on the same ground. No attempt has been made in this case to call in aid the latter clause of the section, which makes it competent to grant a new trial, when it is essential to the justice of the case; and it is agreed on all hands, that even if we did go on these words, they do not give us an unlimited, but merely a sound judicial discretion on this subject. In this country, trial by Jury being new, there

can be few instances of granting new trials ; and the practice in the Court of Session is too short to have established any rules ; we can therefore only look to the law of England. I have consulted the authorities in that law, without any commentary ; and, on the whole, without getting into any of the technicality of the English law, we are of opinion, that in the exercise of a sound discretion, and applying the principles of right reason to this case, we have power to set aside the verdict, and that it ought to be set aside.

We do not assume the power to set aside the verdict as contrary to the opinion of the Court, or of the Judge who tried the case. The principle on which we proceed is laid down by the Lord Justice Clerk and Lord Robertson, with much good sense and perspicuity, in a similar application, in the case of *Baillie v. Brysson*, 12th March 1818, vol. I. p. 341. The inconsistency in the English cases to which these Judges allude, is more apparent than real ; but what depends on discretion must frequently appear inconsistent ; and before Lord Mansfield's time there appears some ground for the charge of inconsistency. His Lordship then stated that he had looked into the original cases, but that

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the views of the English Courts on the subject, at the time Lord Mansfield came to the Bench, would sufficiently appear, from the collection of these cases, in the 6th vol. (5th of fol. edit.) of Bacon's Abridgement. The cases from 1756 are most worthy of attention, as at that time there was the ablest Bench that England, or perhaps any other country, ever saw. The principle may be drawn from *Farwell v. Chaffey*, and *Macrow v. Hull*, in 1757. But the most important case is *Bright v. Eynon*, 1. Barrow, 390, where it is laid down that the Court may grant a new trial where there is reasonable ground to doubt whether justice has been done. It is not necessary to trace the principle through all the cases; but there is one opinion rested on, to which I must refer: it is that of Lord Cambden in 1763, (then Chief Justice Pratt) whose memory lives, and will live.

The volume of Bacon in which this case is reported, is certainly not of the same authority with the first three volumes which were revised by Chief Baron Gilbert. Yet even in Lord Cambden's opinion, as there stated, there is not much to object to; and the other Judges, particularly Justice Gould, lay down exactly the doctrine of the cases in the King's

Bench. Besides, from the manner in which the case is reported, it is impossible to discover whether it was a hard action, or whether there were other grounds for the decision; and in these circumstances it is impossible for the Court to set this up as an authority against all the other cases.

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In 1810 the Court of Common Pleas granted a new trial, not as thinking the verdict wrong, but that more light might be thrown on the subject; and Sir James Mansfield there states, that the Court may grant a new trial on account of the value of the subject, or that the verdict establishes a permanent right.

In the present case we consider it proved, that before 1815, the stream was fit for culinary purposes, and it is proved that it has not been so used since. It is polluted by a variety of substances, and as to some of them there is contrariety of evidence. Where there is contrariety of evidence, the Court will feel disposed not to interfere with the verdict; but in this case there is no contrariety as to the stream being polluted with vegetable matter, which is a ground for their interference.

An architect stated it as his opinion, that this stream is of use to the feuars only as a

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common sewer ; but we cannot take that opinion in opposition to the evidence of a person who proves that he became a feuar on the faith that the stream was to remain pure.

As the new trial is granted on the ground that the evidence of vegetable matter being in the stream remains uncontradicted, perhaps I have said more than enough as to the power of the Court on other grounds to grant a new trial.

The opinion of the Judge who tried the case being against the verdict, is not a sufficient ground for granting a new trial, but is certainly a very strong and important circumstance. We therefore grant the new trial, on payment of costs.

LORD GILLIES.—I shall not add any thing on the principle of law, but may state a few words as to the evidence. It was proved, that, up to 1815, the water of the stream was used for domestic purposes, but that, subsequent to that year, this use of it was abandoned ; and so far from being contradicted, this evidence was confirmed by a witness for the defender.

The vegetable matter was proved by all the witnesses ; and though the defender per-

haps proved that the means he used were sufficient to prevent the bad effects of the other hurtful ingredients, he did not attempt to prove that he prevented the vegetable matter from getting into the stream; and this source of pollution must of course increase with the extension of the works.

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LORD PITMILLY.—Though at first I felt it to be a most delicate matter to interfere with the verdict of a Jury, yet, after considering this subject with the greatest care, and going through all the cases referred to, I came most completely to concur in the opinion delivered.

Skene and *Jeffrey* moved that two additional Issues should be sent to trial; viz. 1st, Whether the stream was polluted, and to what extent, prior to 1815? 2d, Whether it remained so at the date of the next trial; and stated, that these ought to have been tried though the verdict had not been set aside. The Court of Session will be misled, unless there is a return on these questions; and as it would have been competent to apply in that Court for additional Issues, it must also be competent here.

Additional Issues not granted after a first trial.

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Gordon.—The Issues were fully discussed at the time when they were prepared; and, if any fact of importance comes out in evidence, it may be indorsed on the Issues; but I object to a new case being sent to trial. This is a new and irregular proceeding, and there is a final judgment ordering the Issues as they stand to be the Issues to try the cause.


The Second Division of the Court of Session refused a similar application in Lord Fife's case.

Jeffrey.—In Lord Fife's case the motion was to alter the Issues; and the application for additional Issues was not made till after the second trial, and they were refused on the ground that the trustees had barred themselves. Except on the ground of convenience, the Issues now proposed might be tried by a different Jury.

LORD CHIEF COMMISSIONER.—This case was sent here to prepare and settle the Issues; but being a question of heritable right, it goes back to the Court of Session for final judgment. If the question were, whether, on the case going back to the Court of Session, the nuisance were to be put down, that Court might be of opinion, that the facts found are not sufficient to satisfy their minds; but our difficulty


is, that Mr Jeffrey has not shewn us the authority by which we are to do what he now asks. I do not wish to lay down an absolute rule, that in no case this could be done; but I have no difficulty in saying, that after a case has been sent down to trial on one set of Issues, the Court will be very cautious indeed in the exercise of the power to alter them. It is quite true that the Courts of Law in England do not try additional matter in the manner proposed, but the practice is different in the Courts of Equity; for in a Court of Equity additional matter may be sent down to trial, to satisfy the conscience of the Court. But this case is quite clear of such a question; it is a question of declarator and damages, and the Issues were prepared with great attention and much deliberation. The first part of the Issue formerly tried, is on the declaratory part of the case; and the Court and Jury could not come to a conclusion upon that Issue, without a proof of the state of the rivulet previous to 1815; and in this way the first Issue proposed to be added, is embraced by the present Issue.

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On the proposed Issue to try the state of the water at the date of the next trial, it is sufficient to say, that in my opinion, that

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would be sending a new cause to trial. The Issue must be in the action brought, and must therefore be, Whether from 1815 to the date of the summons, the stream had been polluted. It would be a most important alteration to send the Issue proposed; and if it is not to be tried at the same time, and by the same Jury, it would do no good. If the question is to be tried as to the removal of the nuisance, it must be in another action in the Court of Session. Before we could be brought to comply with a request like the present, we must be satisfied, not only that it is proper, but that it is the only remedy the party has.

LORD GILLIES expressed his concurrence in the decision, and said, that if the motion had been granted, it ought to have been on payment of costs.