JEDBURGH.

PRESENT,

LORD CHIEF COMMISSIONER.

MARQUIS OF TWEEDDALE, *v.* KERR.

1821. September 19.

Finding as to the change of the course of a river, dividing two properties.

A DECLARATOR to have it found that the old channel of a river is the march between two neighbouring proprietors; and that about three acres of ground, situate between the old and new channel, belong to the pursuer.

DEFENCE.—Possession beyond the memory of man.

ISSUES.

"1*st*, Whether the water of Kail, admitted "to have been originally the march between "the lands of Grubbet, the property of the "pursuer, and the lands of Gateshaw, the pro- "perty of the defender, did, at a period with- "in 40 years prior to 23d December 1819, "run in nearly a straight direction from a

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"point marked A on the plan, near a place "called Rushie-hole, or Rush-pool, to another "point marked B on the plan, near a place "called Ubats-haughs?

"2*d*, Whether, within the period afore-"said, the course of the said water has shift-"ed to the eastward, whereby three acres, or "thereabouts, of the lands of Grubbet, for-"merly situated on the east side, are now si-"tuated on the west side of the said water?

"3*d*, Whether the said three acres of land, "situated betwixt the former and present "course of the said water of Kail, have been "possessed continually, since the course of the "said water was changed as aforesaid, by the "pursuer or his tenants, by pasturing their "cattle and driving their carts thereon?

"4*th*, Whether the said change was partly "produced by the improper operations of Wil-"liam Kerr, the brother of the pursuer, by "putting stones, about 25 years ago, into the "bed of the said river?—Or,

"5*th*, Whether the change that may have "taken place, has been by the imperceptible "addition of soil to the bank of the river on "the defender's side?"

On an Issue as to an act done by one individual, the Court will not allow evidence as to another, for the purpose of having the fact indorsed.

In the course of the evidence, a question

was put, Whether Gilbert Kerr placed stones in the river?

Cockburn, for the defender, objects.—Both William and Gilbert possessed, and we were prepared with evidence to meet the operations of William.

Jeffrey, for the pursuer.—The fact of putting in stones was the only thing they had to meet; and there is no fair ground of objection, if their predecessor put them in.

LORD CHIEF COMMISSIONER.—The ninth section of the Act 59. Geo. III. c. 35., was intended to prevent parties from losing the benefit of facts of great importance, which might come out in the course of the evidence.

This occurred in Lord Fife's case (See Vol. I. p. 110.), where, in the course of the evidence, a fact came out as to his acknowledgment of the subscription, of such importance, that it might have decided the question. It was therefore thought of importance that the Court should have the power to indorse such facts; but this was never intended as a licence to prove facts of which the opposite party had no notice. This brings the case to the question, What is the

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Issue? The Issues are drawn from the condescendence of the party; and in the preparation of them, the parties have frequent opportunities of making corrections. In the Issues so prepared, the name of *William* Kerr stands; and I am of opinion it cannot be altered. It is clear, then, that I can only admit this evidence on the ground that the question is, Whether stones were put by any body? At first the averment stood, that the stones were put in 25 years ago; and if the Issue had been in these terms, the evidence would have been admissible; but by stating a name, the pursuer may have thrown the other party off his guard, and led him to inquire only as to William. I am therefore of opinion, that a specific question being put as to a particular person, that question cannot be generalized, and that allowing this would tend to injustice and surprise.

If I am wrong, the mode of redress is by Bill of Exceptions on the terms of the Issue, and my judgment rejecting the evidence.

A tenant of a farm not admitted to prove the boundary of the farm.

A witness having stated, that if the pursuer succeeded, the ground would form part of his, the witness's farm,

Cockburn objects—He has an interest; and if there is any point fixed, it is that interest disqualifies.

Moncreiff.—It is hard to be deprived of the best evidence (as he and his father lived upon the spot), for so inconsiderable an interest; and it is not clear that he would not have to pay additional rent.

LORD CHIEF COMMISSIONER.—It seems admitted that he has an interest; and if he has an interest, the amount is of no consequence, and cannot be answered by the usefulness of the evidence.

Moncreiff opened the case, and stated the facts, and maintained that the defender must prove the change to have been imperceptible. The pursuer will prove that it was perceptible, or at least that the river having changed from one line to another, the change must have been perceptible.

Cockburn, for the defender.—We admit that the river formerly ran in nearly a straight direction; and it is proved that a quantity of land is situate between that line and the present course of the river.

If a river changes its course by a sudden burst, or by a visible lump being torn from

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the bank and carried to the opposite side, the ground may be followed. But if the change is by gradual eating from the one side, which all rivers are doing every moment, the proprietor is not, either in law or reason, entitled to follow the ground.

On the third Issue their proof is against them, and on the fourth they have led no evidence.

The last is the great subject in dispute; and it is said imperceptible is not a proper term; but we could not find a better. By using that term, it was not the intention to enquire whether the change was such as could not have been discovered by a microscope; but whether, in common sense, the detrition on one side, and the addition to the other, was perceptible. The witnesses state, that this change was not produced by a sudden burst, or avulsion, or artificial operation; and therefore it could only be in the manner we state.

LORD CHIEF COMMISSIONER.—The counsel for the defender has relieved us from trouble on the two first Issues; and on them you may find generally, unless you think any thing special has been proved. The third Is-

sue affords subject of consideration, and, under the terms of it, the pursuer was bound to prove that he pastured the ground, and drove carts on it continually. The evidence is in your recollection; and the material fact is, that the defender's cattle pastured this ground, and that he turned off the cattle of the pursuer's tenant. As to carts, there is no proof of any being driven, but there is some proof as to the appearance of tracks.

On the 4th Issue you must find for the defender, as the pursuer has failed to prove what he undertook, and it is of no consequence whether that arises from the evidence being in law inadmissible, or from his having made an improper statement.

It is vain at this period to regret the term used in the 5th Issue, as it cannot now be altered. In the language of law, this is termed alluvion, and the difficulty was to find a proper translation of this term.

The term imperceptible cannot be strictly and critically applied to this; but I think you are entitled to take it in a general sense, and to hold that the addition was imperceptible, unless the contrary has been proved. Is there then any proof of avulsion, of a tearing away? In considering whether it could have

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been by imperceptible addition, you will keep in mind the period of time within which this took place, and whether this does not afford a presumption that it was by more sudden tearing? On the other hand, you have a witness proving that this was by gradual wearing; and if this is sufficient to satisfy you, then I think you are safe to find that this ground was formed by gradual and imperceptible additions.

If you return a verdict of this sort, there is no harm in stating that there was no imperceptible addition of soil, but that there has been a gradual wearing away of the opposite bank.

Verdict.—"The Jury found on the first "and second Issues for the pursuer; on the "third, that the three acres of ground have "never been possessed since the change of "the river, by the pursuer or his tenants, by "pasturing, &c.; on the fourth Issue for the "defender; and on the fifth, that the change "of the river has been gradual and imperceptible."

Moncreiff and *Jeffrey* for the Pursuer.
Cockburn for the Defender.

(Agents, *Gibson*, *Christic*, and *Wardlaw*, w. s. and *Brodie* and *Imlach*.)