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a situation that the law is of little importance. This was not a disease in the limbs of this person, but in his breathing; and there is evidence of his habit of walking alone; and when he went to church there is the evidence of the coachman, that after he left the coach he walked in the usual way.

The evidence of his being at market is not so clear, as none of the witnesses fixed a particular day; and though there are cases going nearly as far as would hold going to a shop sufficient, still I do not wish to embarrass the case with this.

Lord Roseberry v. Lady M. and D. Primrose, 24th Nov. 1736. Mor. 3322.

On the evidence, therefore, you will find for the pursuer or defenders.

Verdict—For the pursuers as to the deed.

Cockburn, Skene, and *Marshall,* for the Pursuer.
Moncreiff, D. F., Jeffrey, and *More,* for the Defender.
(Agents, *D. & A. Thomson,* W. S. and *Alexander Gifford,* S. S. C.)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

SMILES *v.* KERR AND TROTTER.

1827. July 17.

THIS was an action of declarator to have the

right to the water of a small stream ascertained, and to have it restored to what was alleged to be the old course.

DEFENCE.—The stream has for more than forty years flowed to the defender's mill.

ISSUE.

"It being admitted that the pursuer, Ro-"bert Kerr, is treasurer to the governors of "James Gillespie's Hospital in Edinburgh; "and that the governors of the said hospital "are proprietors of certain lands in the parish "of Colinton, in the county of Edinburgh; "and that the pursuer, Alexander Trotter, is "also proprietor of certain lands in the said "parish.

"It being also admitted that a stream of "water, which rises at the Bungwell, situate "on the property of Woodhall, in the said "county, runs in an easterly direction, till it "crosses the lane leading from the village "of Colinton to Bonally, both in the said "county, then along the east side of the said "lane, till it reaches a field belonging to the "said hospital, which field is bounded on the "west by the lane, and on the north by a field "called the Burnshot-park, also the property "of the said hospital.

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" Whether, after entering the field, bound-
" ed as aforesaid, the said stream, or a part
" thereof, has, for forty years preceding the
" 1st day of June 1824, or for time immemo-
" rial, run to the eastward until it entered the
" lands of Dreghorn, the property of the pur-
" suer, Alexander Trotter; and whether the
" defender, or his predecessors, have diverted
" the course of the said stream, or a part there-
" of, and have caused the same to run in a
" northerly direction, and not to enter the lands
" of Dreghorn, to the loss, injury, and damage
" of the pursuers?"

Cockburn opened the case for the pursuer, and said, The whole, or at least a large proportion of the stream, flowed through the lands of the pursuers, till the defender deepened the course towards his mill, which now carries off the whole.

After several witnesses had been examined, his Lordship suggested, that there probably was water enough for both parties, and that, unless the defender claimed the whole, it was probably unnecessary to go farther; but if he claims the whole, of course it is not for the Court to stop the pursuer. Mr Jeffrey said,

though they had called evidence to prove possession of the whole by the pursuers, yet they were willing to take a half. On the other side, however, this was not agreed to.

On the cross-examination of the eleventh witness called for the pursuers, he stated, that part of the water had been given off to Sir William Forbes in a pipe.

Jeffrey, for the pursuers.—There is nothing of this in any of their pleadings. They seem to intend to raise a new plea against us, that water was given off, and that we acquiesced. The only plea in law is prescription; and are they under this entitled to prove that I was deprived of the water by other causes?

Moncreiff, D. F.—This is a groundless and absurd objection. I expect to demonstrate that the pursuers have lost the water by other causes than any operation by the defender, and the cause mentioned by the witness is one of them. Their supply was from the waste-pipe.

LORD CHIEF COMMISSIONER.—The question here is, who shall have the water flowing at a particular point at the date of the action? and that point is below where the pipe is taken off. The fact undoubtedly was stated by the wit-

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ness, but it appears to me not to be in the cause. It is said this is got on cross-examination; but it is an universal rule, that though you may on cross-examination put leading questions, and try the truth of the witness, you cannot get in evidence that which is illegal.

This is a question as to the state of the water flowing from a well at the date of the action; and is it possible to draw into this case any thing which diminished that flow long before? What is the stream mentioned in the issue, and which the defender is accused of diverting? Is it a stream that existed long before, or is it the stream at the time the action was brought? Were we to allow this, it would be trying a question as to a different stream from that which existed at the date of the action. The question is not competent on cross-examination, the fact not being within the action.

Moncreiff.—To raise the question, we are entitled to ask, whether any other supply of water flowed into the stream?

LORD CHIEF COMMISSIONER.—If this question had been put in the ordinary course of examination, I do not know that I would have objected, but, in the circumstances in which it

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.