and other circumstances. On the two joined together, you are to say whether you come to the conclusion that he cheated at cards, and that it is proved he did so.

Verdict—"For the defender."

PRESENT

LORD GILLIES.

1830
June 14

LORD FORBES *v.* LEYS, MASSON, AND COMPANY.

Finding for the defenders, on a question whether a dam-dike and canal were injurious to the pursuer.

THIS was a declarator by the heritors of the upper fishings on the river Don, to have it found that the defenders had not acquired right to draw off water from that river, or to have a dam-dike across it, and to have their dam-dike removed, as having been erected under a temporary permission, which was recalled.

DEFENCE.—The pursuers have neither title nor interest to object to the use the defenders make of the water, which is preferable to the rights of the pursuers, and they have aquiesced in and homologated what has been done by the defenders.

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ISSUES. *

"It being admitted that, in the years 1792 "and 1793, the defenders, Leys, Masson, and "Company cut a canal on the north side of the "river Don, for the purpose of conveying wa- "ter from the said river to Grandholme "Haugh, where the bleachfield and manufac- "tory of the defenders are situated, and that "in the year 1805 the defenders formed a "dam-dike across the said river, for the pur- "pose of conveying water into the said canal.

"*Primo*, Whether the said canal, cut as "aforesaid, is to the injury and damage of the "pursuers, or of any and which of them, as "proprietors of salmon-fishings in the said "river?

"*Secundo*, Whether the said dam-dike, "formed as aforesaid, is to the injury and da- "mage of the pursuers, or any and which of "them, as proprietors of salmon-fishings in the "said river? Or,

"*Tertio*, Whether the whole or any, and "which of the pursuers or their predecessors "or authors, or their commissioners, trustees, "or agents, duly authorized, acquiesced in the

* The title of the pursuers was sustained, and the Issues sent by the Second Division of the Court of Session.

" formation or continuance of the said canal?
"' And,
" *Quarto*, Whether the whole or any, and
" which of the pursuers or their predecessors,
" or authors, or their commissioners, trustees,
" or agents, duly authorized, acquiesced in the
" erection or continuance of the said dam-
" dike?"

Skene opened for the pursuers and stated the facts.—The pursuers believed the injury to their fishings to be produced by the cruives, but discovered that it was by this dike. Many defences have been stated. It has been said there are many other dikes, and that till they are removed this must stand. But the Court will direct you that this is irrelevant, and that the extent of their works is equally so. If they bring evidence on their issues, we shall under these explain the delay.

A commission to examine a witness during a trial refused, as it was not alleged that he had been taken suddenly ill.

At the close of the pursuers' evidence it was mentioned that a witness for the defender was unable to attend, but might be examined on commission.

LORD GILLIES.—If you can prove that he was able to attend at the beginning of the trial, and was taken suddenly ill, this might be

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done; but you have no case unless he was well at the commencement of the trial.

Jeffrey, D. F. opened for the defenders and said, Their manufactory was one of the largest in Scotland, which had cost L. 200,000, and employed 2000 people, and that a verdict for the pursuers would give them nothing, and leave the defenders nothing. Fishings are diminished in all rivers, and it is the other obstructions in this river, and the vigilance of the lower fishers which has injured the fishings of the pursuers, which never were worth L. 50 a-year. But independent of this, they are barred by acquiescence, and it is necessary to explain the doctrine on this subject.

LORD GILLIES.—This appears to me quite unnecessary, as nothing will induce me to give any opinion on the subject of acquiescence. This is a question of fact; if the pursuers have acquiesced the jury will find so, and if not, they will find the reverse. Acquiescence is an English word, and the definition of it may be got from a dictionary,—as a law term I am unacquainted with it.

Jeffrey, D. F.—There must be explanation

of what acquiescence is, and what I am to prove. If a party allows his neighbour, without objection, to lay out large sums of money in the construction of works, he is not to be allowed afterwards to challenge them to the ruin of his neighbour. This is equitable, and in this case there are innumerable circumstances which entitle the Court and Jury to presume acquiescence. Where an act is taking possession of the property of a neighbour, law and equity require some act on the part of the proprietor, as a gift is not to be presumed, though even here open possession has in some instances transferred property. But there is another class of cases, to which the present belongs, where the acts are done by a person on his own property; and in this class, by not interrupting, the neighbour ceases to have a right to remove the work. In this case, mere publicity without direct evidence of the defender's knowledge, is sufficient to defend the works, especially after thirty years silence. The pursuers are to be presumed to have granted permission for erecting the dike and taking the water, and it was their interest to acquiesce, as it brought a number of people to consume the produce of their estates. Where the question is knowledge, notoriety is sufficient, and here the question is only

Hamilton *v.* Harvie, 2 Mur. Rep. 38.

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tacit acquiescence. There are circumstances showing the knowledge of each pursuer.

The issues being, whether a work was injurious, and whether the pursuers acquiesced—if the work is proved not injurious, held unnecessary to prove acquiescence.

After part of the evidence was led, Mr Cockburn stated, that they had proved that no injury was done to the pursuers, and, therefore, it was unnecessary to lead further evidence.

LORD GILLIES.—If the jury are satisfied that no injury was done, they may say so. In the acquiescence you stand as pursuer, but have no reply. It would be hard for the jury to sit here and listen to the other part of the case, if there was no injury to the fishings.

Hope, Sol.-Gen.—The party must take the risk if they choose to stop here. There were two motions before the Lord Chief Commissioner and Lord Mackenzie on this subject, which were refused, and the object of what is now proposed is to undo what was then done, and to have two trials. I am entitled to reply on the whole case, and if the party intended to stop here, was it fair to make so powerful an address on the other part of the case?

Jeffrey, D. F.—If this evidence is new to the Solicitor, the strength of it is little less new to us.

Hope, Sol.-Gen. in reply,—The whole case

was opened for the defenders, and you are now asked to confine your attention to the point of no injury being done, as if you had not heard the rest of the speech. That speech makes it necessary for me to reply on the whole case; but you will be doing injustice if you allow what was said as to acquiescence to have any influence on your minds. You must consider this question as if the defenders were now erecting the dike, and if so, there is no doubt they have not shown sufficient ground to entitle them to do so. Much was said, but not proved, as to the diminution of the fish in the river, and also as to the height of the cruive and other dikes; but if they are too high they may be removed; and whatever may be the opinion of engineers and others who saw the river in flood, as to this one not being injurious, the fact, that the bed of the river is laid dry by it for half a mile, demonstrates the injury. The title of the pursuers is sustained, and they begin with the first dike in the river, and must take one at a time.

1563, c. 68.

LORD GILLIES.—In cases coming before a jury, law and fact are frequently joined; and when that is the case, it is the duty of the Judge to state the law, and the jury to take the

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law so stated. But it is better when the case is free of that combination, and we are here in that desirable situation. Much law has been stated on both sides, but you shall hear none from me. On the one side, there was much ingenious argument as to acquiescence; and on the other, on the law as to cruives; but neither of these are here, and my duty is merely to bring you back to the issue.

If the judgment of Lord Cringletie sustaining the title decides, as was said, that this is injurious, then no issue would have been here. We are not to settle the law, but to answer one question as to a dam-dike, and another as to a canal; and the question is not whether, in certain circumstances and situation of the river, these would be injurious, but are they injurious? And to answer this question you may convert it and ask yourselves, whether the removal of the dike would be beneficial, and if it would, then it is injurious. Is this dike and canal injurious where it is, and in the circumstances in which it is? This is the subject to which your attention must be confined; and not the question which has been put to you whether the erection of it was wrong. The question is not the dimensions of the dike, or the effect of lowering it, but whether it is injurious to the fishings.

Evidence was given as to the dike, and that it laid part of the river dry, and that the fishings were fallen off; and had this been the whole I would have said it was injurious; but the evidence for the defenders must also be considered, and the witnesses for them who measured the dike, and also compared it with that of another manufactory on the same river; they state that if the other obstructions were removed, that this would not prevent the fish getting up. I do not know what effect this evidence may have upon you, but I cannot get over what they say as to the fish getting up if the other obstacles were removed.

The Solicitor-General requested his Lordship to note what he stated as to the other obstructions in the river. A Bill of Exceptions was tendered to the construction put on the issues, and the exception sustained by the Second Division of the Court.

Verdict—For the defenders.

Hope, Sol.-Gen., Skene and *A. Anderson,* for the Pursuers.
Jeffrey, D. F., Cockburn, Lumsden, and *Maitland,* for the Defenders.