[*5th August* 1839.]

(Appeal from the Court of Session, Scotland.)

CHARLES TENNANT and Company, Appellants.[1] (No. 29.)

[*Attorney General (Campbell)—Lord Advocate (Rutherfurd).*]

JAMES HAMILTON (Pauper), Respondent.

[*A. M'Neill — James Anderson.*]

Bill of Exceptions — Proof — Witness. — In an action of nuisance one of the defenders witnesses, when cross-examined by the pursuer, answered, "Knows Glas-"gowfield (a neighbouring property); never knew of any "damage done there." The counsel for the pursuer then proposed to ask the witness, "Whether he had known of "any sum having been paid by the defenders to the pro-"prietors of Glasgowfield, for alleged damage?" The judge, at trial, refused to allow the question to be put, whereupon the pursuer excepted. There was a verdict for the defenders: Held (reversing the judgment of the Court of Session, which allowed the exception,) that the proposed inquiry, being irrelevant to the subject matter, was inadmissible as evidence.

Per L. C.—It is an acknowledged rule of evidence that a collateral irrelevant inquiry cannot be gone into, to discredit a witness on the other side.

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[1] 1 D., B., & M., new series, p. 502; Fac. Coll., 14th Feb. 1839.

1st Division.

Lord Jeffrey, Judge at Trial.

JAMES HAMILTON, late gardener at Mount-pleasant near Glasgow, brought an action against Charles Tennant and Co., manufacturers at Saint Rollox, in the immediate neighbourhood, for the purpose of abating a nuisance of which he complained, and to obtain damages from the defenders for the alleged loss sustained by noxious and offensive smoke, and other vapours. The issues sent to trial were:—"It being "admitted that the defenders are, and since the year "1819 have been, proprietors of a certain portion of "land and buildings erected thereon, near Glasgow, "and that chemical substances are and have been "manufactured since the said year: It being also "admitted that by the lease, of which No. 6. of process "is an extract, dated 30th May 1816, the pursuer "obtained possession, as at Candlemas 1815, as tenant, "of a certain garden situate to the eastward of the "said works:

"1. Whether, during the year 1819, and subsequent "thereto, up to Martinmas 1832, or during any part "of the said period, there arose from the said works of "the defenders certain noisome, offensive, noxious, or "unwholesome smoke and other vapours, to the nui-"sance of the said pursuer, whereby the produce of the "said garden was deteriorated, and the pursuer incom-"moded and annoyed in the enjoyment thereof, to the "loss, injury, and damage of the pursuer?

"2. Whether, on or about Martinmas 1832, the "defenders wrongfully took possession of 150 cart-loads "of manure, the property of the pursuer, or about that "quantity, and wrongfully retain the same, to the loss, "injury, and damage of the pursuer?

" 3. Or whether, in the said year 1819, previous to " the pursuer's entering into possession of the said gar- " den, the smoke or other vapours issuing from the said " works of the defenders were as great or nearly as " great in quantity, and as noisome, offensive, noxious, " or unwholesome, or nearly so, in reference to the said " garden of the pursuer, as those issuing from the said " works of the defenders during the said period, from " 1819 to Martinmas 1832?"

Upon the trial before Lord Jeffrey and a common jury at Glasgow the pursuer adduced evidence to establish that the smoke and other vapours from the works of the defenders had, in point of fact, occasioned damage and injury to the produce of other grounds in the neighbourhood of the said works; and the defenders adduced evidence to establish that the said works did not, in point of fact, occasion any damage or injury to the produce of any other grounds in the neighbourhood. Among other witnesses for the defenders was a person named David Smith, a land-surveyor in Glasgow, who stated that he had surveyed the lands in the neighbourhood, that he had made a plan of the vicinage, and mentioned several places which, in his opinion, had sustained no damage.

On cross-examination, by the pursuer, the witness made the following answer: — " Knows Glasgowfield" (a place not previously mentioned). " Never knew of " any damage done there." The counsel for the pursuer then proposed to ask the witness whether he had known of any sum having been paid by the defenders to the proprietors of Glasgowfield, for alleged damage then occasioned by their works? This question was

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objected to by the defenders; and the objection being sustained, the pursuer tendered an exception.

Thereafter, the jury found for the defenders.

A bill of exceptions was then presented to the First Division of the Court, when their Lordships ordered minutes of debate upon the competency of the cross interrogatory.

Statement.

On advising the minutes their Lordships pronounced the following interlocutor:—"Edinburgh, 14th Feb. "1839. The Lords having advised this bill of excep-"tions, and heard counsel for the parties, allow the "exception, set aside the verdict in this case, and grant "a new trial."

Judgment of Court, 14th Feb. 1839.

Tennant and Co. appealed.

Appellants Argument.

Appellants.—The question rejected does not bear upon the issues. Even though an affirmative answer had been given to the inquiry, it would have been inadmissible as evidence. The payment of money, though proved, did not establish damage done. An award or compromise, and a sum paid down, would not be relevant evidence for this purpose. Such is the law even in regard to admissions made for the purpose of settling an alleged claim extrajudicially.[1] Considerations might have induced the appellants to settle with the proprietors of Glasgowfield, although there might have been no damage or no possibility of proving any damage. If the proprietors of Glasgowfield had re-

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[1] 2 Starkie, 21, 22; Robertson v. Baxter, 2 Murr. Rep. 427; M'Lachlan, 4 Murr. 218; Wight v. Ewing, 4 Murr. 585.

jected a proffered sum, and brought their action for nuisance, they would not have been allowed in that action to give the offer in evidence, nor to put the question as here proposed. It is clear then that the answer to this interrogatory cannot be made evidence for the respondent.

But then it is said that the proposed question was in any view competent as a means of testing the credibility of the witness. In the first place, that was not the object for which the evidence was tendered; this view of the matter was not suggested at the trial, nor there disposed of, nor is it adverted to in the bill of exceptions. Secondly, If the question had been put to test the credibility of the witness, the judge should necessarily have been informed of it. But, thirdly, It could not be put to test the credibility of the witness, because it would clearly produce an answer involving matter irrelevant to the issue. The rule on this subject is well laid down in the last edition of Phillipps on Evidence, by Mr. Amos.[1] By the law of England you may discredit a witness by examining him as to statements which he made upon other occasions, in order to discredit and contradict him, but then he can only be asked as to statements which are relevant in themselves. See Baron Parke in Crowley v. Page.[2] In trial by jury the attention of the court and the jury ought to be kept to the issue; it is incompetent to travel into other matter. A party may prove his whole case from his adversary's witnesses by cross-examination; but it is not to be done by irrelevant cross questions.

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[1] Edition 1838, p. 909.

[2] 7 C. & P. 791.

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Respondent's Argument.

Besides, the question was objectionable, as tending not to elicit matter of fact, but of inference.

Respondent.—The appellants correctly state that the object and line of investigation adopted by both parties at the trial had been to show, on the one hand, that injury had been done to other grounds; or, on the other hand, that it had not. This, in truth, was the result of the statements on the record, which, if looked to, would show that such damage to the neighbouring grounds had been specifically condescended on. [*Lord Chancellor.*—That would merely shew whether or not the issues had been rightly framed.] It shows that there was no surprise at the trial, for although some of those statements were denied by the appellants on the record, they were not stated to be irrelevant or incompetent; and no motion having been made to have these struck out, they had competently been admitted to be proved. There was no room for the plea of res inter alios acta in reference to the proposed line of cross-examination; it had an immediate legal bearing on the question at issue. If proving the fact of injury to other grounds be competent, it is not easy to understand why matter essential to ascertain the witness's means of knowledge of that fact should be excluded. The competency of proving that damage was done is the test of the relevancy of the question. The witness might himself have relevantly mentioned the fact of payment of money as his causa scientiæ, supposing his evidence to have been for, instead of against, the respondent. Under the A. S., 29th November 1825, cross-examination for that purpose is permitted. Would not payment

of money under a verdict of a jury, or decree of a court, or of an arbiter, have been admissible as evidence? Non constat that it was done by compromise. [*Lord Chancellor.*—How does the question of compromise arise under this first issue?] It arises in this manner: the assumption that the respondent is attempting to make evidence of a payment made in order to compromise a disputed claim, pervades the whole of the appellants argument; this is an entire mistake. It will be time enough to consider whether a compromise of a claim of damages with the proprietors of Glasgowfield can affect the merits of the present cause, when any such compromise is established. The respondent has inquired merely into the witness's knowledge of the fact of the payment, and no point is raised as to whether a compromise between the defenders and a third party may be given in evidence in the present cause. The appellants say no party complained of the nuisance: the respondent says there were complaints, and that sums were paid; to which it is replied that these may have been paid under compromise. But the question was not, Do you know that there was a compromise? but, Do you know that money was paid for alleged damage? [*Lord Chancellor.*—How do you make out it was not to buy peace?] Assuming that the fact of payment of money was collateral to the fact of damage having been done, was there any thing to prevent the respondent from cross-examining the witness in relation to it? What is foreign to the issue must not be confounded with what is collateral to the issue; foreign matter may be equally inadmissible, whether it is sought to be proved as a substantive fact, or as testing the

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credibility of a witness. It is certainly, however, not so with respect to matter which is merely collateral to the issue; although matter be collateral, this does not imply irrelevancy. Collateral matter may indeed be also irrelevant, and then it becomes foreign, but it may likewise be relevant; it may bear on the case, or on the evidence already adduced, or on the credibility of a witness under examination.

Even in chief, collateral but relevant matter may be inquired into, but much more in cross-examination, and where the points to which the evidence is collateral form the substance of the witness's previous examination; for in cross-examination, the object of which is to sift evidence and try the credibility of witnesses, a great latitude is allowed in the mode of putting questions.[1]

It is in cross-examination that collateral matter generally emerges, and it has been expressly ruled in England that collateral questions trying the truth of a material part of the witness's story may be put[2]; the same rule is followed in Scotland.[3]

Whatever might have been the abstract competency of the respondent asking the question objected to, the appellants paved the way for it; they laid a foundation by asking questions on the same subject, and they could not prevent the respondent from exhausting

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[1] 1 Phillipps, Evidence, 272; Parkin v. Moon, 7 C. & P. 408; Harris v. Tippet, 2 Camp. 637.

[2] Ex parte Bardewell, 1 Mont. & Ayr. 206. Archbold, Dig. Plead. and Evid., 2 ed. p. 486.

[3] Pearson v. Walker, 20th July 1835, 13 S., D., & B. 1138, and F. C. Jury Sitt. p. 85.

the inquiry. This principle applies to the most incompetent species of evidence—a party's own statements. Where a pursuer asks a witness what a defender said, the defender may, in cross-examination, inquire as to further statements, so as to try the accuracy or the general character of the memory of the witness.[1] The actual damage done might be proved by the cross-examination of this witness; besides, the respondent was entitled to damage the credit due to the witness. The question ought to be fairly looked to, not critically scanned; the word "then," which occurs in the question, meaning the fact of payment for damage "then" done; that is to say, at that time, or before the money was paid.

Respondent's Argument.

LORD CHANCELLOR.—My Lords, in this case there was a jury trial in Scotland, and a bill of exceptions tendered upon the examination of a witness named David Smith. The object of the action was to try a question of nuisance to a garden in the neighbourhood of a manufactory, which, it was said, emitted vapour and smoke prejudicial to the property of the pursuer, the party complaining. David Smith was called for the defenders, and he was examined as to certain premises in the neighbourhood of the manufactory in question, but he was not examined by the party producing him with respect to the place called Glasgow-field,—not the place in question, but a place situated near the manufactory. Both parties went into evidence for the purpose of showing what the effect of this

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[1] Chapman, 17th March 1821, 2 Murray, 460.

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manufactory emitting smoke and vapour was upon the lands similarly circumstanced to those of the party complaining. Whether that was a legitimate modof inquiry is not now to be entered into, for both parties pursued it, and for one purpose it was undoubtedly a legitimate mode of inquiry, viz., for the purpose of ascertaining what the effect was of the smoke and vapour emitted by this manufactory. This witness was examined as to several lands in the neighbourhood, and then a cross-examination took place. He says,—(his Lordship quoted the evidence at length). Then comes this answer, "Knows Glasgowfield; never knew of "any damage done there." He is being cross-examined by the pursuer (by the party complaining of the damage); the pursuer, therefore, uses the witness (as he had a right to do), not for the purpose of cross-examining him as to what he had said for the party for whom he was originally called,—namely, the defenders,—but he uses him, if he can, for the purpose of extracting any evidence that might be beneficial to his side, and he asks him if he knows Glasgowfield; the witness says he knows Glasgowfield; he asks him then whether he had known of any damage done there; his answer is, "I never knew of any damage done "there." That was not the answer which the pursuer, cross-examining the defenders witness, wished him to give. He had fixed him with the knowledge of Glasgowfield; he intended to use him to show that Glasgowfield had been injured by the vapour and smoke emitted from the manufactory; but, however, the answer given was not for the benefit of the party cross-examining him. Then the counsel for the pursuer pro-

posed to ask the witness " Whether he had known of " any sum having been paid by the defenders to the " proprietors of Glasgowfield (the situation of which " is pointed out on his plan), for alleged damage then " occasioned by their works?"

Now, he had already said that he knew of no damage done there. If that question had been asked him by the defenders, no doubt a great latitude in cross-examination might have been permitted to the pursuer, for the purpose as well of ascertaining what he meant by " did not " know," as for the purpose of testing the accuracy of his statement—of the credit due to that statement; but it so happens, when he says he knows Glasgowfield, and never knew any damage done there, it is an answer given by him to a question of the pursuer in cross-examining him. The pursuer is entering into a line of examination for the first time, and having got an answer which did not suit his purpose, he endeavours to get rid of the effect of that answer by putting a question upon a point short of what was the witness's knowledge; viz. " Whether he had known of any sum having been " paid by the defenders to the proprietors of Glasgow- " field, the situation of which is pointed out on his plan, " for alleged damage?" The pursuer meant, if he could get an answer favourable to his view, to make that part of his case; he meant, not being able to get the witness to say that he knew of any damage, to get him to say that which he conceived would be the next best evidence, but which, in fact, would be no evidence at all. If the witness had answered in the affirmative that he had known of money being paid for alleged damage, it would be no evidence, because money paid upon a complaint made, — money paid merely to purchase

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peace, money paid upon demand,—is no proof that the demand is well founded; it is not, therefore, to be given in evidence in support of the fact of damage being sustained.

Now, upon general principles the rule of law in this country and in Scotland must be the same: if a pursuer calls a witness, and asks him as to money being paid for alleged damage, his answer in the affirmative is not evidence of actual damage. If the pursuer had made a claim upon the owners of the manufactory for damage done to his field from the smoke and vapour emitted, and the owners had given money to quiet his complaint, that would be no evidence of the damage; it is money paid to buy peace, and to stop complaint; it is very often a wise thing, however unfounded a complaint may be, for parties to pay a sum of money in order to quiet the party making the complaint. But this does not rest merely upon general principles. The rule of law in this country, as laid down by a great authority, has been cited by the appellants; and from the authorities also cited by them it appears that there is no distinction between the two countries in this respect.[1]

The question then clearly could not be put in order to elicit evidence for the party making the complaint, but it is said it was admissible in order to test the credit of the witness. Now, the witness had said nothing in his examination by the party for whom he was called, touching this subject matter. He had spoken of other properties, but he had said nothing which could lead to this cross-examination, and therefore it was not for the purpose of testing the accuracy or truth of any thing he had said. It cannot

[1] See cases cited, p. 824.

be supported upon that ground, nor was that the ground, as I understood the argument, upon which it was attempted to be supported, but that it might be put as a matter of inquiry, with a view to test his credit. But if it be not evidence, it is an inquiry perfectly collateral; it is an inquiry into a matter which was not relevant to the subject matter in dispute: it would be relevant if it were admissible in evidence, but it is not. It does not relate to the subject matter, and it is an acknowledged law of evidence that you cannot go into a collateral irrelevant inquiry for the purpose of raising a collateral issue to discredit a witness produced on the other side.

On these grounds the Learned Judge trying the cause was of opinion that the question was not an admissible question under the circumstances of this examination, and to that ruling of the Learned Judge, unfortunately for all parties, because leading to great and unnecessary expense, a bill of exceptions was tendered. It was a question which, answered in either way, could not have affected the result of that cause in the slightest degree. The witness, whether his evidence was correct or not, had spoken of other descriptions of property in the neighbourhood of this manufactory, and he is asked whether he knew of money paid for alleged damage to a particular field, as to which he is not examined in chief; whether he answered yes or no, it cannot affect the question; now the Learned Judge so thought; unfortunately, however, a bill of exceptions was tendered, and unfortunately the Court of Session were of opinion against the ruling of the Learned Judge; they were of opinion that this question might be put, and

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was an admissible question. The party against whom that decision was come to in the Court of Session necessarily comes here in order to have that judgment considered, because the Court of Session being of opinion that the bill of exceptions was well founded, had no alternative but to direct a venire de novo; it was necessary that the case should be tried again, in consequence of the Court of Session coming to this opinion, however unimportant the point might be; the Court of Session, being of opinion that it was an erroneous ruling of the judge before whom the issue had been tried, had no alternative but to direct an inquiry de novo, so that there was to be a fresh inquiry upon a point which could not affect the question one way or the other, whether the jury had or had not come to a right conclusion upon the evidence proved before them; but assuming that the jury have (which if they have not would be subject to a motion for a new trial, and in that way, if there had been a failure in the jury trial, the parties might have had an opportunity of trying the case over again),—but assuming that the jury had come to a right conclusion upon the matter before them, here is to be a new trial upon a point of evidence which, in whatever way the witness answered, could, in my opinion at least, not affect the result.

My Lords, it is very unfortunate when cases take that turn, and protracted litigation ensues upon points which have not the slightest bearing upon the result of the case. In this country much depends, in reference to tendering bills of exceptions, upon those who have the conduct of the cause, and though it is competent for counsel to tender bills of exceptions, it is in practice

reserved only for cases of great importance, where the real question between the parties is conceived to turn upon it, and where it requires the adjudication of the Court to set them right upon some doubtful point; it is a matter to be regretted that the rule which prevails so beneficially in this country, of reserving that course of proceeding only for cases that really deserve it, is not followed in Scotland, inasmuch as this case is an example of the evil which must flow from the too liberal use of that right by the suitor of tendering a bill of exceptions, and calling in question the ruling of a court of justice. My Lords, this is an instance in which I cannot but think it would have been better for the parties to have taken the course of bringing before the Court the merits of the case as to the propriety of the finding by a motion for a new trial, instead of bringing it by the course of error upon a bill of exceptions.

My Lords, I have no doubt, however, that this was a question which, under the circumstances, it was not competent for the party to put, and that the Learned Judge who tried the cause came to a right conclusion upon the evidence, and the bill of exceptions upon that point ought to be disallowed. Under these circumstances I move your Lordships to reverse the interlocutor appealed from, which decided that the Learned Judge who tried the issue had not properly ruled, and that the bill of exceptions ought to be disallowed.

The House of Lords ordered and adjudged, That the interlocutor complained of in the said appeal be and is hereby reversed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, with

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directions to disallow the bill of exceptions, to determine all questions of expenses between the parties in the said Court of Session, and to proceed otherwise in the said cause as shall be just, and consistent with this judgment.

DEANS and DUNLOP — HAY and LAW, Solicitors.