ARNOT . . . . . APPELLANT.
BROWN . . . . . RESPONDENT.

1852.
6th and 7th May.

In Scotland an interdict may be granted against a nuisance, not existing but anticipated, though perhaps problematical.
Order by consent for experiments under scientific superintendence to ascertain whether a projected manufacture would prove a public nuisance. Interim interdict against the work. Report that the manufacture conducted according to a certain specification would not prove noxious. Acquiescence in that report. Interdict thereon recalled.
HELD, that as the matter then stood the point of nuisance or no nuisance was concluded; and that the Appellant could not demand an issue for trial before a jury.
Comments on the prolixity of the Appellant's Case.

MR. *Rolt* and Mr. *Anderson,* for the Appellant; Mr. *Bethell* and Mr. *G. H. Pattison,* for the Respondent. The authorities cited upon the only point decided by the House were *Trotter* v. *Farnie* (*a*), *Swinton* v. *Pedie* (*b*), and *Dickson* v. *Monkland Canal Company* (*c*).

The circumstances appear from the remarks of the Lord Chancellor in moving for judgment (*d*).

Lord Chancellor's opinion.

The LORD CHANCELLOR (*e*):

My Lords, the law of Scotland allows any one to ask an interdict *prospectively.* And of this jurisdiction we have an illustration in the present appeal.

Being called upon to grant an interdict before the alleged nuisance came into existence, the Court below ordered certain experiments to be made; because, my Lords, a candle manufactory is not necessarily a nuisance. Science has gone far to prevent many things which were formerly of that description from being so now. It is, therefore, not very easy to determine beforehand whether any given operation shall prove noxious or not. In this state of uncertainty the Appellant asked for an interdict to prevent the Respondent from erecting on the premises in question

(*a*) 5 Wil. & Sh. 649. (*b*) M'L. & Rob. 1018.
(*c*) 1 Wil. & Sh. 636. See also 12 Shaw, 518; 15 Shaw, 523; and 4 Dunlop, 386.
(*d*) But see the Court of Session Cases, Second Series, vol. ix. p. 497; and vol. x. p. 95.
(*e*) Lord St. Leonards.

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"machinery fitted for the purpose of candle-making." An interim interdict was granted, and upon an order for an experiment that interdict was enlarged.

The Appellant insisted that candle-making was in itself, and at common law, absolutely a nuisance. To this the Respondent answered, not by a denial that candlemaking was intended, but by an assertion that, according to his method of conducting the work, no nuisance would arise.

My Lords, the experiments ordered by the Court below (for there was a succession of them) were conducted under the superintendance of scientific persons;—both parties being allowed to be present and to watch the proceedings. It is not necessary to go into particulars; but it is impossible that any result could have been more satisfactory. It is enough to state that the report to the Court, from those scientific persons chosen with the consent of both parties, was entirely in favour of the Respondent, whose process of candle-making was shown to be one that "could not in the least incommode the neighbourhood, either by injuring health or giving out any offensive smell."

My Lords, the Appellant, in his printed case, states that "as this report was a *judicial* report, affording a *primâ facie* case in favour of the Respondent's new mode of manufacture, he was advised that he ought to *consent to a recal of the interim interdict.*" He adds, to be sure, that this consent was with an "understanding that the cause would be proceeded with by adjusting an issue, closing the record, and sending the case to trial with a view to final judgment." But, my Lords, no such understanding was embodied or expressed in the interlocutor which followed that consent. And I apprehend there is nothing in the case to justify the belief that any such understanding existed. The acquiescence in the

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report is admitted; and by the interlocutor of the 17th of July, 1849, proceeding on that report, the interim interdict is recalled. This order, therefore, must be read to mean that, as the matter then stood, the point of nuisance or no nuisance was concluded.

But the Appellant, in the next place, says: "I see now that this trade, carried on according to the specification, is not a nuisance; but it may become one." My Lords, when that contingency arises, the Appellant will be at liberty to apply for, and obtain from the Court of Session, a fit and proper remedy for any mischief he may sustain.

Without going into several points, which have been very ably argued at your Lordships' bar, but which do not call for decision as they have been got over by waiver and acquiescence, I submit that no ground has been shown for your Lordships' interposition, and that this appeal should be dismissed with costs.

Ordered accordingly.

RICHARDSON, LOCH ,& MCLAURIN.—WILLIAM ROGERS.