1766. *December* 9. JOHN PAXTON *against* GEORGE MORE.

PROMISSORY NOTE.

Arrester on a Debt of the original Creditor was preferred to the Indorsee.

[*Faculty Collection, IV.* 278; *Dictionary,* 12,259.]

JUSTICE-CLERK. Promissory notes have as extensive a course as bills; are indorsed daily, and are understood, in the practice of merchants, though not in law, to be valid: but still they have not the same privileges as bills.

AUCHINLECK. Bills are good for nothing if they debord from their proper nature. How then can a promissory-note have the privileges of a bond? A promissory-note is indorsable, but such indorsation has no privileges. The arrestment is good.

PITFOUR. In England, promissory-notes have, by statute, the same privileges as bills; this might be expedient in Scotland, but it is not the law of Scotland. Our decisions are uniform as to this matter of notes. It was doubted, of old, whether promissory-notes were probative: at last it was found that they were probative. The next question, whether indorsable?—As probative, they may be indorsed; other deeds *in re mercatoria* are indorsable, as debentures, —31*st January* 1724, mentioned by Edgar, 22*d January* 1750, *Alison* against *Seton.* Another question, whether indorsable blank? Here a difficulty from the Act 1696. That Act cannot extend to promissory notes or debentures; yet, in custom, such blank indorsements are allowed. An indorsement may be filled up *a quocunque* without check; but still the other extraordinary privileges of bills are not to be extended to promissory-notes. He who takes indorsements must beware, for he has no negotiation. The decision, *Clarkson,* in 1757, is just. After an assignation, you cannot prove by the oath of the assigner.

The Lords preferred Paxton, the arrester,—adhering in effect to Lord Elliock's interlocutor.

Act. H. Dundas. *Alt.* J. M'Claurin.

1767. *January* 20. JAMES DEWAR of Vogrie, *against* MR WILLIAM FRAZER, Writer to the Signet.

PROPERTY.

A proprietor may build a Drawkiln for burning lime on any part of his property, although thereby a conterminous heritor's property should be hurt.

[*Faculty Collection, IV.* p. 88; Kaimes's *Select Decisions,* p. 323; *Dict.* 12,803.]

COALSTON. A proprietor may use his property as he pleases, unless it be

in æmulationem vicini: this work is not *in æmulationem vicini.* The power of removing nuisances ought to be tenderly used. If a house is built just close to another, this may be a great nuisance, but there is no remedy.

KAIMES. In exercising your own property, you must not destroy your neighbour's, *immittendo in alienum,* though you may debar him from benefit: the first is the case here: I would desire to know, whether any other place might not serve for a drawkiln.

PRESIDENT. Any thing that is a nuisance, cannot be erected to the hurt of a neighbour, if the nuisance is such in its own nature, or occasioned by what is not a proper use of the subject.

Mr Frazer ought to have considered this inconveniency before he purchased the house. Lord Abercorn's fire-engine is not a nuisance, lying off the road.

PITFOUR. It is improper to exert an arbitrary power in limiting the use of property. The nature of property is such, that it may be used in any manner for a man's advantage, if not *in æmulationem.* But there is an exception founded in the nature of property; as I cannot encroach upon you, so cannot you upon me, by sending noxious messengers. Can it be said that I do not meddle with my neighbour's property, when I send in a smoke and vapour upon him? The case in the Roman law of *taberna casearia* is very similar.

HAILES. This is a public nuisance,—a limekiln situated just upon the highway: every man that travels that road may be affected by it: it is not only poison, but dangerous, as nothing is apter than smoke to terrify horses; every man, therefore, who is concerned in the road, seems to have a right to sue for removing the nuisance. The case of the brick-kilns near the Queen's Palace is not to the purpose; for it is probable that those kilns are more ancient than the Palace, so that the error was in building the Palace too near them. Lord Mansfield's judgment upon nuisances seems equitable, and to the point.

JUSTICE-CLERK. By diverting water into another man's ground, I use his property: It is carrying the analogy very far, when we apply it to the immission of smoke;—every manufactory would send out smoke in a certain degree. It is owing to the common course of nature, that smoke goes over the neighbouring ground.

BARJARG. No man is to be restrained from the use of his property, unless he exercises it *in æmulationem.* This *æmulatio* appears when the thing may be done equally well in a place where the neighbour would receive no hurt.

AUCHINLECK. If the principle *non licet immittere in alienum* is to relate to air, which is common to every body, there can be no drawkiln in Scotland, and every sort of work occasioning smoke may be stopt.

The Lords allowed the work to proceed, and adhered to Lord Auchinleck's interlocutor.

Act. G. Wallace. *Alt.* D. Dalrymple.

Diss. Kaimes, Pitfour, Kennet, Hailes.