

“ THE LORDS found it proved, That the sheep libelled were sent by the pursuer to be grazed on the farm of Sauchinside, possessed by the deceased John Spence as tenant, and that the grass mail was paid by him: Found, that the said sheep were purchased *bona fide*, by the defenders, from the said John Spence, and the price paid at the time of delivery: Found it not proved, that the defenders were in the knowledge that the property of the sheep did belong to the pursuer; and therefore, and in respect that the sheep so bought by the defenders, had been sold or slaughtered by them, before citation in this process, and that it is not proved that the defenders, or either of them, were gainers by the transaction, assoilzied the defenders.”

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Act. James Dundas.

Alt. Dav. Dalrymple, jun.

C. B.

Fac. Col. No 14. p. 223.

1767. January 20.

JAMES DEWAR of Vogrie *against* Mr WILLIAM FRASER junior, Writer to the Signet.

MR FRASER was proprietor of a house and some lands a few miles to the south of Edinburgh, where he and his family were in use to reside during the vacations.

Mr Dewar of Vogrie was proprietor of some lands in Mr Fraser's neighbourhood, a part of which run out into a point, reaching within 324 feet of Mr Fraser's mansion-house.

Upon the extremity of this point, nearest to Mr Fraser's house, Mr Dewar set about building two draw-kilns for burning lime. Mr Fraser stopt the work by a suspension, which came to be discussed before the Lord Auchinleck Ordinary; who, after having ordered a plan of the grounds, found, 'That as Mr Fraser the suspender, has no servitude upon Mr Dewar's grounds, and that the place where Mr Dewar proposes to situate his draw-kiln, appears, in sundry respects, to be most commodious for him, and no ways *in æmulationem* of Mr Fraser, although it will be attended with inconveniences to him, Mr Dewar has right to carry on his work, and allows the same to proceed, and repels the reasons of suspension, and decerns.' But his Lordship afterwards reported the cause to the Court upon informations.

Pleaded for Mr Dewar, The place where he proposes to build his kiln, although upon the nearest part of his lands to Mr Fraser's house, is in sundry respects the most convenient situation he can have, and therefore cannot be considered as carried on *in æmulationem* of Mr Fraser; and that being the case although it should be inconvenient for Mr Fraser, or disagreeable to him, that is not sufficient to prevent the work from being carried into execution, as every proprietor has the undoubted right of using his property in the way most for his own advantage. And Mr Dewar will reap considerable profit from this

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A proprietor may build a draw-kiln for burning lime on any part of his property, although there by a contentious heritor's property should be hurt.

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work, so that, although it should be attended with some loss to Mr Fraser, Mr Dewar is undoubtedly entitled to carry it on, as Mr Fraser can pretend no servitude over Mr Dewar's lands; and the following authorities were referred to; Bankton, vol. 1. p. 678. Voet. lib. 39. tit. 2. § 5. l. 21. D. De aqua et aquæ pluvie arcendæ; l. 26. D. De damno inf.; Zeos. ad Pand. lib. 39. tit. 3. § 4. & 5.; January 19th 1765, Sir Robert Gordon against Grant of Knockando, No 83. p. 3576.; July 8th 1760, Clark *contra* Gordon, *voce* PUBLIC POLICE; 1740, Millar *contra* Lindsay. See APPENDIX.

Answered for Mr Fraser, He did not controvert the general principle laid down by Mr Dewar, of proprietors being at liberty to use their property in the way most for their own advantage. But such right was subject to exceptions both from law and equity, l. 206. D. De reg. jur. and thence, in many cases, mutual obligations arose between the proprietors of conterminous tenements, whereby the one is prevented from doing any thing *in æmulationem* of the other; that the point fixed by Mr Dewar, for building his kiln upon, is the very extremity of his property, and the nearest to Mr Fraser's house; that there was no necessity for building his kiln upon that point, as it might be built in other places to equal advantage; that, besides the damage which would be done to Mr Fraser, building a draw-kiln upon that place would be a public disadvantage, being just upon the side of the turnpike road.

In the present case, Mr Fraser does not insist that Mr Dewar shall not build any draw-kilns; all that he desires is, that the proposed stance or situation of them may be altered; as otherwise his house will be altogether uninhabitable, on account of the smoke and noisome smell and vapours, which will proceed from said draw-kiln, if Mr Dewar shall be allowed to erect it on the spot he proposes: That this case is very different from those in which one neighbour, by operations carried on upon his own property, may deprive another of an advantage which he had formerly enjoyed, as depriving him of a prospect, by building houses or such like. For, in this case, an actual damage is done by the one party to the other, which law will not admit of; lib. 8. § 5. D. Si serv. vind.; Burrow's Reports, p. 333; June 24th 1750, Fleming *contra* Urie, *voce* PUBLIC POLICE; June 20th 1756, Kinloch *contra* Robertson. *IBIDEM*.

THE LORDS adhered to the Lord Ordinary's interlocutor.

Reporter, *Lord Auchinleck*.
For Dewar, *Geo. Wallace*.

For Fraser, *Dav. Dalrymple*.
Clerk, ———.

A. E.

Fol. Dic. v. 4, p. 173. Fac. Col. No 50. p. 88.

* * * Lord Kames reports this case :

THE dwelling-house of William Fraser, writer to the signet, in the village of Foord, happens unfortunately to be situated a very short space eastward from some ground belonging to his neighbour, Dewar of Voguie. Dewar finding this a convenient spot for a lime-kiln, set about the building, without giving

himself any trouble about the distress that would be occasioned to Mr Fraser and his family, by the smoke of the lime-kiln, when the wind is in any of the western points. The matter was brought before the Court by suspension, and the following interlocutor was pronounced: 'Finds, That as Fraser the suspender has no servitude upon Dewar's grounds, and that the place where Dewar proposes to place his draw-kiln, appears in sundry respects to be the most commodious for him, and noways *in æmulationem* of Fraser, though it will be attended with inconveniencies to him, Dewar has right to carry on his work; therefore, repel the reasons of suspension,' &c.

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The rule was admitted, *Quod non licet immittere in alienum*, but the plurality thought that the present case does not come under the rule, for that the smoke of the lime-kiln was emitted into the air, and carried as the wind blew, sometimes into the suspender's property, and sometimes in a different direction. Most of the Judges gave their opinion, that if Dewar could have placed his lime-kiln so as to be less noxious to his neighbour, without great loss or inconvenience to himself, he was bound to yield so far upon the principle of neighbourhood.

Sel. Dec. No 251. p. 323.

1768. January 14.

MAGISTRATES of Linlithgow, &c. against ELPHINSTONE of Cumbernauld.

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THE wester and easter lakes of Fanyside, covering 70 acres of land, are distant about a mile or two from the source of the river Aven, and what water issues from these lakes descends naturally to the river. The mill of Fanyside is served by water from these lakes, but far from sufficient to keep the mill in constant operation. The water after serving the mill descends to the river, and it is the only water that reaches the river, unless when the lakes in great speats overflow their banks.

Can a river be appropriated, or any of its feeders.

The lakes, the mill, and the whole surrounding lands, belong to Mr Elphinstone of Cumbernauld; and an artificial canal being projected to direct the water of the lakes into the river Carron for serving the Carron Company, the proprietors of many mills upon the river Aven took the alarm, and commenced a declarator against Mr Elphinstone, concluding, that by positive prescription they had acquired a servitude upon the lakes, which Mr Elphinstone could not deprive them of by diverting the course of the water.

At advising this cause, much darkness was occasioned by a notion which some of the Judges unwarily adopted, as if a river could be appropriated like a field or a horse. A river, which is in perpetual motion, is not naturally susceptible of appropriation; and were it susceptible, it would be greatly against the public interest that it should be suffered to be brought under private property. In general, by the laws of all polished nations, appropriation is autho-