1768. *July 27.* WILLIAM RALSTON *against* GAVIN PETTICREW.

PROPERTY.

One must not use one's Property so as to destroy any thing belonging to a Neighbour.

[*Faculty Collection, IV.* p. 141; *Dictionary*, 12,808.]

MONBODDO. *Nemo potest immittere in alienum;* but, if there is no servitude, one may build upon his own ground, though to the manifest prejudice of his neighbour. The question here is, Whether is the pursuer hurt? From the proof, I must conclude that he is.

PITFOUR. I always thought that the rule of the civil law was right; and it is as just now laid down.

ALEMORE. As to immitting smoke, there is no help for it; but here a real damage is done.

HAILES. The case *Fraser* against *Dewar*, mentioned by the defender, does not apply; for *there* the limekiln was built *in prædio rustico*. And, besides, Dewar proved that there was no place upon his ground where the limekiln could be built, unless that where it was built. So that the work was not only free from the exception of being done *in æmulationem*, but appeared to be erected from necessity; and Dewar had no choice but either to erect his limekiln where he did, or relinquish his undertaking altogether.

COALSTON. When I send into my neighbour's ground any thing that hurts the health of the inhabitants, or the cattle, or the vegetables, then it must be stopped.

AUCHINLECK. There is a place for every thing. Noisome works ought not to be erected in such a way as to be hurtful to the neighbourhood. Many things may be nuisances in and near towns, which are not so in the country.

On the 27th July 1768, the Lords, in respect of the real damage occasioned to Ralston, found that the brick-kilns must be removed, altering Lord Gardenston's interlocutor.

On the 25th November 1768, they adhered.

Act. A. Lockhart. *Alt.* A. Crosbie.

1768. *August 4.* MRS FLORENCE M'LEOD *against* MR JOHN NICOLSON.

[*Faculty Collection, IV.* p. 138; *Dictionary*, 14,946.]

PERSONAL AND TRANSMISSIBLE—SUCCESSION.

An Annuity, assigned to a Husband in a contract of marriage, transmits to his Heirs, though Heirs are not mentioned.

MONBODDO. The question is, Whether is this a *personale pactum*, limited to

the husband? The determination of this must depend upon circumstances. I think that it is personal to the husband. It is extraordinary that a woman should, at her second marriage, renounce what she had by her first marriage. The word *heirs* seems omitted *dedita opera*, in this clause; for it is inserted in the other clauses. The wife does not absolutely give up her liferent: *qui provident sibi, providet et hæredibus*, is a rule in law; because, in ordinary cases, there is no rule to the contrary.

GARDENSTON. When a man, for an onerous cause, purchases an annuity, what does he purchase? All that the seller has to give. Here the husband is *surrogated* in the full right of the wife.

COALSTON. It is dangerous to depart from general principles: *qui providet sibi, providet et hæredibus*, is a maxim that takes place in all onerous assignations. If this assignation had been granted to a stranger, it would have been good to his heirs: it can make no difference, as to the import of the words, that the assignation is to the husband. The question is, Whether there be any thing special here, to induce us to depart from the legal meaning of the words? There is nothing unnatural for a wife to give up her former jointure where she gets an equivalent. I think that the marriage-contract is rational; that its words are clear; and that the annuity is expressly conveyed.

KENNET. Had the heirs of the husband, and the children of the wife been the same, there would have been nothing unnatural in the provision, as claimed for the husband; but there was an heir of a former marriage. The rule of law does not relate to annuities. I think that the word *heir* was omitted intentionally, and that the provision does not go to *heirs*.

PITFOUR. The chief question is what is rational. I incline to think that the liferent was limited to the life of the husband: it is not customary to give to a husband, after his death, an alimentary provision settled on his wife. Here there was an alimentary provision by the first marriage-contract, and that a very small one. The wife gets less by the second: I never heard of a second contract of marriage, by which a lady was to be a loser. I would require strong words to prove this. We must interpolate an additional sentence in order to divest a wife of a small alimentary provision; and this, by the construction of a Latin sentence, which neither party ever heard of, *qui providet*, &c. Had this been meant, the parties must have been knaves or fools. We must not presume folly or knavery.

KAIMES. The woman's whole substance was 150 merks *per annum*. By her second marriage-contract, she is provided to certain subjects which are better than her 150 merks. There is a difference between a conveyance and an obligation: In the former, heirs succeed, though not named; in the latter, they succeed only when named.

AUCHINLECK. It appears, from the marriage-contract, that the wife was denuded; for she has disponed to her husband, substituting him: after this, how shall we bring back the sum from the husband? All that the wife got by her first contract, was 150 merks *per annum*; she could not expect to rise in her price upon a second marriage. It was not unreasonable to give down 50 merks *per annum* for a husband, and a suitable provision. Her plea is, that, as she had two husbands, she must have two jointures. Had she got a sum of money

from her first husband, it would naturally have gone to the second and his heirs. Is it then unnatural to suppose that she would settle her first jointure upon him and his heirs? The woman had probably something to bring to her first husband. She took an equivalent. At her second marriage, she gave up that, and took what she considered as equivalent; and so it has turned out, for she has got a third husband. If nothing was meant to be given but a liferent during the marriage, nothing was given at all, for the husband would have had that without any contract.

ALEMORE. I have heard a good deal of negotiations between the husband and the wife, of which I see no evidence. I judge by the deed. I think the woman made a good bargain to prevent *quæstiones voluntatis*, which are exceedingly arbitrary. I judge by the words of the deed: they are express and full. There was no occasion for mentioning heirs: many deeds go in favour of heirs, although not expressed.

PRESIDENT. A simple right of liferent is not to be measured by the rules of succession in lands. Why should I imply heirs when not expressed? There is no equity to exclude the woman from her former jointure. Upon the whole of the case, I think that the provision does not go to the husband's heirs.

JUSTICE-CLERK. Nothing but the clear will of parties can lead me to put a construction upon a clause, contrary to the common course of things; and I do not see any such clear will in this case.

" On the 28th January 1768, the Lords found, that the annuity in question returns to the pursuer, and does not descend to her deceased husband's heirs."

On the 1st July 1768, they found that the assignation in the contract of marriage did carry, not only the annuity which fell due during the marriage, but also the annuities which were to fall due thereafter, during the life of the pursuer." And, on the 4th August 1768, they adhered.

Act. B. W. M'Leod, D. Rae. *Alt.* A Elphinston, Ilay Campbell. *Reporter*, Coalston.

Diss. Strichen, Justice-Clerk, Pitfour, Kennet, Monboddo, President.

Non liquet, Elliock.

1768. *August* 5. MESSRS LAWSON, JARDINE, and COMPANY, *against* ANDREW THOMPSON, Tacksman of the Meal-market at Dumfries.

BURGH ROYAL.

A Duty granted upon what sold in the Market-place, not to be eluded by selling elsewhere.

[*Faculty Collection, IV.* p. 145; *Dictionary*, 1965.]

AUCHINLECK. This duty has been immemorially exacted, and with good