No 29.

Answered: The pursuer has not perhaps instructed a practice for 40 years, of artificially diverting the water for the use of her meadows, but, from time immemorial, the rivulet has overflowed them naturally, and thereby contributed to their fertility.

That a navigable river cannot be diverted is laid down L. 10. § ult. D. De acq. et aqu. pluv. The same doctrine is established with respect to smaller runs of water, L. 4. 7. C. De servit. et aqu. And this is not contradicted by the laws referred to by the defenders, which will be found to relate not to perennial runs of water, or rivulets, but to collections of rain-water, falling upon the superior grounds, or to springs rising in them, which, according to the doctrine of those laws, may be applied to the necessary uses of the proprietor.

Lord Stair gives his opinion, that, " without a servitude, water may not be altered or diverted from its course," II. 7. 12. And so it was decided, 25th June 1624, Bannatyne *contra* Cranston, No 3. p. 12769.; and more lately in the question between the Town of Aberdeen and Menzies, 22d November 1748, No 16. p. 12787.

" THE LORDS found, that the defenders have no right to divert the water of the rivulet within their grounds, so as to prevent its returning into its natural course, upon entering into the lands of the pursuer."

Act. *Rae.* Alt. *Macqueen.*

G. F. *Fol. Dic. v.* 4. *p.* 175. *Fac. Col. No* 68. *p.* 307.

1768. *July* 29.

WILLIAM RALSTON, Surgeon in Glasgow, *against* GAVINE PETTIGREW.

No 30.

One cannot use one's property so as to do real damage to that of another.

THE defender, proprietor of a field in the town of Glasgow, consisting of some acres adjacent to a garden belonginig to the pursuer, having found clay fit for making bricks, erected a brick-kiln about thirty feet distant from the march

The pursuer brought an action, setting forth, that this brick-kiln did damage to his garden, and concluding, that the defender should be decreed to remove it to such a distance as that it might be attended with no prejudice to the pursuer's property.

A proof having been allowed before answer, it appeared, that part of the march-hedge opposite to the kiln was dead, and that the trees, bushes, and grass in the pursuer's garden, for some way from the march, had suffered by the heat of the kiln.

Pleaded for the defender: Every person is entitled to use his property in the way that may be most profitable to him, though a consequential damage should thence arise to his neighbour. From this general principle have sprung the variety of servitudes that make such a figure in the law, and which are nothing

else but restraints from using one's property to the prejudice of others. Such are the servitudes, *altius non tollendi*, *ne luminibus officiatur*, &c. The necessity of those servitudes for such restraint clearly evinces the general principle; and, accordingly, it has been found, that, where there is no servitude, one may build one's house to any height, though the consequence should be to stop all the lights in the house of another; 10th March 1613, Sommerville, No 1. p. 12769. No 30.

This general principle admits of two limitations only; one, that the exercise of one's property must not be merely *in æmulationem vicini;* the other, that it must not be a public nuisance. The present case falls under neither of these. The brick-kiln brings considerable profit to the defender; it is likewise of extensive public utility, and its present situation is the most convenient, being just by the clay-pit.

There was a case lately decided by the Court, extremely similar to the present, between Mr Fraser, writer to the signet, and Mr Dewar of Vogrie, where it was found, that Mr Dewar was not obliged to remove a lime-draw-kiln, built just upon his march, and very near Mr Fraser's house, No 27. p. 12803.

Answered for the pursuer: Besides the two admitted by the defender, there is a third limitation of the general rule as to the use of property, viz. that it do not encroach upon, or directly destroy that of another: Thus, if one has a river or stream of water running through his ground, it is an established point, that he cannot erect any work upon it which may hurt the property of the inferior heritors, by rendering the course more rapid, or by regorging do damage to that of the superior heritors. In such case, there is no need to inquire, whether what has been done was *in æmulationem* or not. The proper place for that limitation is where something has been done, which, though disagreeable, or even prejudicial to a neighbour, yet does not directly encroach upon, or destroy any part of his property.

There is a solid distinction betwixt the case of Mr Fraser and the present. Mr Fraser complained, that the smoke of the lime-kiln might, when the wind blew from a certain quarter, be offensive only, and render his dwelling less agreeable. Here the defender's kiln does real damage to the pursuer's property.

"The Lords, in respect of the real damage done to the trees and plants in the pursuer's garden, by the vicinity of the defender's brick-kiln, found the defender was obliged to remove said kiln, at a distance sufficient to protect the garden from said damage, and to remit to the Lord Ordinary to proceed accordingly.

Act. *Lockhart.* Alt. *Crosbie.* Clerk, *Kilpatrick*

A. R. *Fol. Dic. v.* 4. *p.* 173. *Fac. Col. No* 79. *p.* 141.

*** The Lords pronounced the same judgment in a case precisely similar, 1st June 1791, Steele against Crockat. See Appendix.