NO. 6.

" he is bound to return the said mill-lead or tail-race at the place where it " formerly did return into the river Leven, before the erection of the said " lint-mill."

Mr Melville reclaimed.

And the Lords returned to the interlocutor first pronounced.

Lord Ordinary, *Justice-Clerk, Rae.* Act. *Ar. Campbell, Wm. Erskine.*
Alt. *Solicitor-General Blair, Craigie, Monypenny.* Clerk, *Pringle.*

D. D. *Fac. Coll. No. 229. p. 519.*

1808. *May* 12. MISSES GLASSFORD *against* JOSEPH ASTLEY.

NO. 7.

The proprietors of a small garden in a town found entitled to erect a screen of wood on their own ground, close upon the windows of an adjoining proprietor's house, which looked into their garden, for the purpose of excluding these windows from this view; there being no servitude, *luminibus non officiendi*, and the windows being two of them newly made, the third newly enlarged.

THE Misses Glassford were proprietors of a garden attached to a house in Borrowstounness. Joseph Astley was proprietor of a building immediately adjoining, which had some windows looking into this garden. This property had no servitude, *luminibus non officiendi*, over the garden. Astley, in order to make a better use of his property, enlarged one of the windows looking into this garden, which had formerly been an open granary window with wooden spars, and converted it into an ordinary dwelling-house window with glass casement. Though the garden was overlooked from various other quarters, yet the Misses Glassford, not liking it to be so closely looked into as it became liable to be from Astley's windows, erected a wooden screen, on their own property, but within a foot and a half of these three windows, and so high as to cover all of them. After submitting to this for two years, Astley pulled it down by his own authority; on which Misses Glassford applied to the Sheriff to compel him to re-erect it at his own expence, and to prohibit him from touching it in future.

Astley at the same time petitioned the Sheriff to prohibit the Misses Glassford from re-erecting it.

In these processes the Sheriff pronounced this interlocutor, (December 27. 1805,)—" The Sheriff conjoins this complaint with the complaint at the in- " stance of Joseph Astley relative to the same subject; and having consi- " dered the debate in both processes, finds, that Mr Astley has not produced " nor alleged the existence of any writing which grants him a servitude of " free light or prospect over the property of the Misses Glassford, or which

No. 7. " can serve as the ground of a plea of possessory judgment; which plea is " further inapplicable to this case, in as much as two of the windows in " question have only recently been struck out of the wall by Mr Astley, and " the third has been recently enlarged and altered by him from an open " granary window with wooden spars into an ordinary dwelling-house win- " dow with a glass casement: Finds that the wooden screen complained of " by Mr Astley was confessedly erected by the Misses Glassford, within " the bounds of their own property, and at the distance of seventeen inches " or thereby from the wall of his house; and as the said operation has a " lawful and allowable object in maintaining the privacy of their garden, " and hindering the same from being overlooked or injured from the win- " dows of Mr Astley's house, and this at a less expence to themselves than " by erecting a wall of stone and lime, which they might warrantably do, " it cannot be reputed an act done *in emulationem vicini:* Therefore, and " having considered the judgment of the Court of Session, in the late very " similar case of Dunlop against Robertson, 1st December 1803, finds that " Mr Astley did wrong in cutting and throwing down the said screen; re- " moves the interdict granted against the Misses Glassford relative to the " erection of such a screen; and prohibits Mr Astley from again throwing " down the same when erected *."

The defender advocated the case to the Court of Session, when the Lord Ordinary pronounced this interlocutor, (May 31. 1806,) " Advocates the " cause; repels the defences pleaded for the raiser of the advocation, Jo- " seph Astley; and decerns against him in terms of the interlocutor of the " Sheriff complained of in the advocation."

The cause came before the Inner-House by petition and answers.

Argument for the petitioner:

No person is by law allowed to use his property *in emulationem vicini,* to build up any thing, for instance, on his property, which is of no use at all

* In a note subjoined to the interlocutor of the Sheriff, (Mr Hume, Professor of Scots Law,) the case of Robertson is thus reported:—" Robert Robertson, writer in Ayr, had a house there, with a small back ground, not more than 30 feet long, and enclosed with a wall eight feet high. His neighbour, Dunlop, having built a house within three feet of this back ground, with its windows looking that way, Robertson pulled down his old wall, and erected a new one, which darkened the windows of Dunlop's house. The Lord Ordinary, and afterwards the whole Court, found that Robertson had a right to do so.

to himself, but of great detriment to his neighbour. Nor is this all. Nothing will be allowed to be built which causes a great evil to a neighbour, unless it is of considerable or serious use to the person who builds; and particularly, nothing will be allowed to be built which, without any serious use to the builder, directly and immediately hurts a neighbour. These are the established doctrines of what is called the law of nuisance. They are recognised in the laws of all countries. In that of England, *vide* Blackston, B. 3. ch. 13.—The King against White and Ward, 20th May 1757, Burrows' Reports. In the civil law, which is universally received in Europe.—Gaill. Observ. Pratic. lib. 2. obs. 69. § 28.—Gratiani, Discept. Forens. c. 745. n. 37, 38.—Heringius de Molendinis, quæst. 15. § 34.—Mevii Comment. ad jus Lubec. p. 3. t. 12. art. 7. § 30, 31, 32.—Menoch de Arb. Jud. cas. 156. § 9.—In the law of Scotland, "No man," says Lord Stair, B. 2. T. 7. § 7. "may dispose so upon his own ground as to put any positive "prejudice, hurt, or damage upon his neighbour." See also Bankton, B. 2. T. 7. § 15.—Erskine, B. 2. T. 1. § 2.—Fraser against Dewar of Vogrie, Jan. 20. 1767, No. 27. p. 12803.—Ralston against Pettygrew, July 29. 1768, No. 30. p. 12809.—Ibid. Steele against Crokat, June 1. 1791. But in this case the advantage to be gained is quite trifling and fanciful, since the garden has no pretence to privacy. The evil done to the petitioner is very great; for it shuts up the windows of his house; and it is quite direct, for the screen is erected expressly to shut up these windows, and for no other purpose whatever. NO. 7.

It is very true, that a proprietor may build a wall to the edge of his property without regarding the lights of his neighbour. But that is, because it is very highly useful for him to build in this manner to the edge of his property. When a house, or even a garden wall, is built in this way, there is no suspicion of *emulatio*; the useful purpose of such erections is sufficiently apparent; and without any inquiry, it is fairly presumable from the very nature of them. A stone wall is so expensive, that nobody would build it merely for whim or ill nature; and therefore it may, in all situations, be safely presumed to be done for a reasonable purpose. This presumption may be usefully admitted to save nice investigation; and on this principle was decided the case mentioned in the Sheriff's interlocutor. There a solid and expensive stone wall was built; but in this case there is no room for any such presumption, as the screen here erected cost little or nothing. The

No. 7. fact then must be looked to, which plainly is, that it was of no serious use to the respondents; no use bearing any proportion at all to the evil suffered from it by the petitioner.

Argument for respondents:

The rule of law, that a person having ground in property free from servitude, may build on it to the verge without regard to the buildings that stand on the adjoining property, is highly expedient. It is plain and simple; every body can know it; and suit his conduct to it. It prevents inextricable difficulty in settling the rights of neighbours. Accordingly it is fixed in our law past all question *. The case of Dunlop against Robertson is a sufficient example of it, where a set of windows were covered by a wall built for that very purpose; and the Court found that it could lawfully be done. It is a mere jest to say, that a stone wall is different in this respect from a wooden screen. It is argued, indeed, that the building of a stone wall, being expensive, affords a presumption of a serious purpose of utility to the builder, which the raising of a wooden screen does not; but it is absurd to talk of presumptions where the fact is quite plain. The purpose in the case of Robertson was nothing else but to avoid being overlooked; that was too plain to be matter of presumption; and the same purpose exactly exists in this case. It would be ludicrous to say to the respondents, you may cover these windows by a wall of stone, perhaps of brick, but not at all by a wooden wall, for malice builds in wood, but rarely in brick, never in stone. The case of Robertson did not go on any such presumption, but on the general rule, that a proprietor of ground may build to the verge of his property. This rule is absolute, and excludes all question about *emulatio*.

If there were room for a question of *emulatio*, there is here no proof of *emulatio*. The respondents have an advantage from keeping up this screen, for it prevents what they feel to be an evil, *i. e.* their garden being liable to a close inspection, at all times, by the inhabitants of the petitioner's house. This feeling is nowise so rare or whimsical as to be undeserving of regard. There is, therefore, no proof of *emulatio* or malice.

As to the idea, that not only an advantage, but a considerable advantage must appear to be gained, when a person uses his own property so as even-

* So found, 10th March 1613, Sommerville, No. 1. p. 12769. Donald against Dick, 15th November 1750, No. 66. p. 1935.;—Clark against Gordon, 8th July 1760, No. 12. p. 13172.

tually to put a neighbour to inconvenience; in short, that there must be a proportion approaching to equality, between the advantage to be gained by the one and that lost by the other, it is far too vague and open to arbitrary opinion to be law. It would throw loose the whole law of property, and occasion inextricable litigation. The utmost that can be said is, that what is plainly done from mere malice shall not be allowed; but if any use can be shewn, such as removes the charge of malice, that is enough. This, accordingly, is all the length to which the writers or other authorities of our law, that are quoted, go. NO. 7.

The civil law is the same; and no text is produced to shew the contrary, though the commentators, whose speculations are not trammelled by practice, entertain various opinions. One half of those quoted, however, are in favour of the respondents; but our own decisions are our best commentary on the civil law, of which we have in this matter adopted, and applied the principles.

The English law of nuisance has no application, for the lights stopped here are not ancient lights, as those were in the case Blackstone mentions.

The Court (24th Feb. 1808) adhered to the interlocutor of the Lord Ordinary.

The defender reclaimed; but his reclaiming petition was refused, without answers (12th May 1808.)

The majority of the Court adopted the argument for the respondent. One Judge thought that of the petitioner well founded.

Lord Ordinary, Act. *Dun. Macfarlane.* Alt. *J. Glasford.*
Agents, *John Tweedie,* and *Macritchie & Little.* Clerk,

M. *Fac. Coll. No.* 37. *p.* 127.