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### Ae fond kiss

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## AE FOND KISS: A PRIVATE MATTER?

Hector L MacQueen\*

Incongruous as it may seem to those who knew Alan Rodger only as judge or scholar, one of his many other accomplishments was after-dinner speaking.<sup>1</sup> This included giving speeches at Burns Suppers, the annual events at which Scots all over the world celebrate the anniversary of the birthday of their national bard on 25 January 1759. In line with the reputation of Robert Burns, these suppers tend to be bacchanalian affairs, with recitals from the poetry and speeches leading on to toasts – to the haggis, the Immortal Memory of Burns himself, and the lasses (or the laddies as the case may be<sup>2</sup>) – plus selections from the songs of the Bard. Alan’s engagement with this tradition emerged for me one January when I was teaching in Florida and corresponding with him on other matters. I mentioned that I was organising a Burns Supper in my host university, and Alan responded immediately with information about the Immortal Memory he had in hand for a gathering of Scottish lawyers in London. Alas! I never heard Alan speak at any Burns Supper. But the paper which follows builds from – or perhaps tones up – an Immortal Memory that I myself later delivered to a roomful of lawyers in Alan’s native Glasgow. Another of his interests was ‘people-watching’, speculating on the business and relationships of the men and women who happened to come under his eye, whether professionally or in moments of relaxation; and I like to think that the element of such speculation in this paper would have appealed to him at least as much as its legal and historical content. Finally, its principal source is some previously un-noticed scribbles on documents held in the Advocates Library in Edinburgh, where Alan himself spent much of his professional life and made similar discoveries that he then published to the world.<sup>3</sup>

On 16 May 1804, the Court of Session decided to prohibit the continued publication of 25 passionate personal letters written by Robert Burns to ‘Clarinda’, the love of his life (at least between December 1787 and February 1788, when most of the letters were written).<sup>4</sup> The letters had been published in a slim pocket-sized volume in spring 1802, whereupon proceedings were commenced in November by the holders of Burns’ copyright and, subsequently, his family.<sup>5</sup> The Court’s decision came even though Burns had been dead for

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\* FBA, FRSE; Professor of Private Law, University of Edinburgh, and Scottish Law Commissioner. I am happy to acknowledge gratefully the considerable assistance that I have received from Andrea Longson, Librarian of the Advocates Library, Edinburgh, in the course of my research for this piece. I am also grateful for all kinds of other assistance from Professor John Cairns, Dr John Finlay, the late Professor Susan Manning, Dr Donald Smith, and Professor Niall Whitty.

<sup>1</sup> Some sense of what was offered on such occasions can be gleaned from Lord Rodger of Earlsferry ‘Humour and Law’ 2009 SLT (News) 202-213.

<sup>2</sup> One of the more intimidating experiences of my early youth was reciting the Address to the Haggis at the Clarinda Ladies Burns Club in Edinburgh, when few other male persons were present and the relevant toast was ‘to the laddies’.

<sup>3</sup> See e.g. ‘Lord Macmillan’s Speech in *Donoghue v Stevenson*’ (1992) 108 LQR 236; ‘The Codification of Commercial Law in Victorian Britain’ (1992) 108 LQR 570; ‘David Daube (8.2.1909-24.2.1999)’ (2001) 118 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romantische Abteilung* XIV, XXI-II.

<sup>4</sup> *Cadell and Davies v Stewart* (1804) Mor, *Literary Property*, Appendix, 13-16. The report appears to have been compiled specifically for Morison’s Dictionary from the Faculty Coll of Session Papers, for which see further below, n 37.

<sup>5</sup> See Anon, *Letters Addressed to Clarinda etc by Robert Burns, the Ayrshire Poet, Never Before Published* (1802). See the report cited at note 4 above for the course of proceedings before the decision of 16 May 1804. The book’s introduction, dated 1 March 1802, states: ‘As the Editor is vested with the sole power to publish these letters, any other person presuming to Print them, will be prosecuted in terms of Law.’ The book was also

eight years, and his physical relationship with Clarinda, so far as could be told from the letters, had involved only heavy breathing and perhaps, late at night, the occasional fond kiss and cuddle (of which more anon). But Clarinda was still very much alive at the time of the case and living in Edinburgh; she was in possession of the originals of the letters in question; and, averred the publisher of the book, Mr Thomas Stewart, bookseller of the Trongate, Glasgow, she had consented to their publication.

Not being a party to the case, however, Clarinda (whose real name was Agnes McLehose, and who was usually known to her friends as Nancy) was in no position to deny Stewart's allegation before the court. Nor did she really want to 'go public' about her affair with Burns.<sup>6</sup> At the most intense period of their relationship, they were each married to someone else: Burns in his irregular relationship with Jean Armour,<sup>7</sup> who had already borne him twins in 1786 and was again pregnant by him back in Ayrshire; Clarinda to a dissolute Glasgow lawyer, James McLehose, from whom, however, she had been estranged and living apart since 1782. In itself this was scandalous by contemporary standards, since quite apart from the disgrace of leaving her husband, how she managed to survive thereafter was unclear.

Perhaps the most important detail of all in the 1804 case, however, was that amongst the judges of the Court of Session was the lady's cousin, William Craig.<sup>8</sup> He had been her financial, moral and spiritual guardian since her flight to Edinburgh in 1782 as a near destitute 23-year-old. Mistress McLehose's financial survival depended almost entirely on her cousin and upon maintaining a good character as a devoted mother and devout church-goer. Lord Craig, Senator of the College of Justice from 1794, makes an unlikely Max Clifford figure, but it is difficult to avoid the conclusion that in 1804 he was at least partly responsible for salvaging her reputation in a crisis that threatened to destroy her altogether.

A little more information about the Burns-Clarinda affair helps in understanding what happened in the 1804 case.

Robert Burns spent the winter of 1787-88 in Edinburgh, where he was seeking to follow up the success of the Kilmarnock edition of his poetry published in 1786, obtain money and patronage, and widen his experience and influence. He lived in a rented flat at No 2 (now No 30) St James Square, just behind the newly built Register House at the east end of Princes Street. At the beginning of December 1787 he went to a tea-party and there met the attractive, yet religiose and bookish, Agnes McLehose. Like Burns, she was 28 years old, and lived with her two surviving children and her servant Jenny Clow at General's Entry

registered at Stationers Hall, i.e. a copyright was claimed by the publisher. A facsimile of the volume with an introduction by G Ross Roy was published by the University of South Carolina Press in 2009.

<sup>6</sup> My account of the affair is drawn mainly from the following works: Robert Crawford *The Bard: Robert Burns, a Biography* (2009) 279-98, 341-6, 361, 364, 378-9; James Mackay *Burns, A Biography of Robert Burns* (1992, 2004 reprint) 368-409, 422-5, 487-91, 560; Ian McIntyre *Dirt and Deity: A Life of Robert Burns* (1995) 174-98, 202-11, 282-3, 288-91, 331, 362-3. There is an inadequate biography of Clarinda: Raymond Lamont Brown *Clarinda: The Intimate Story of Robert Burns and Agnes MacLehose* (1968). See also the works cited in note 10 below. For a fictionalised account see Donald Smith *Between Ourselves* (2009).

<sup>7</sup> There had never been any formal marriage ceremony between them but their relationship had been such as probably to make applicable the form of irregular marriage known as *per verba de futuro subsequente copula*. Burns subsequently openly acknowledged Jean as his wife.

<sup>8</sup> On Craig see Francis J Grant *The Faculty of Advocates in Scotland 1532-1943, with genealogical notes* (1944) 43; George Brunton and David Haig *An Historical Account of the Senators of the College of Justice from its Institution in MDXXXII* (1832) 540-1.

just off Potterrow on the south side of Edinburgh – not the best part of town in those days, but not the worst either.<sup>9</sup>

After the tea-party, Burns and Nancy began a high-flown but increasingly amorous correspondence which lasted for the next three months, addressing each other and signing themselves as ‘Sylvander’ and ‘Clarinda’ respectively.<sup>10</sup> They wrote initially because Burns had managed to fall out of a carriage (possibly due more to the coachman’s than Burns’ consumption of alcohol<sup>11</sup>) and was consequently laid up at home with a dislocated knee, unable to get about on foot or, indeed, at all. So the two communicated via the hourly penny postal service, and also the courier services of Jenny Clow. Later, it would have been socially difficult for them to meet openly except in other people’s company, so the pseudonyms provided at least a fig-leaf of protection for their identities should letters delivered by third hands miscarry in some way. Burns’ womanising reputation was already well established and well justified, so it was a great risk to any female’s good name to be seen alone with him. Email, texting and tweeting, had they existed in the late eighteenth century, would have been useful to the couple, although their words would have had to be fewer and shorter, if not abbreviated.

When Burns’ knee recovered in January 1788, he began paying visits to Nancy late at night in Potterrow as well as continuing to write between visits. Nancy urged him to walk to her house rather than come conspicuously in a sedan chair, or even worse a coach: ‘A chair is so uncommon a thing in our neighbourhood, it is apt to raise speculation.’<sup>12</sup> But he could go home in a chair, since the neighbours were ‘all asleep by ten’.<sup>13</sup>

No-one knows what actually went on during these visits to Potterrow. There was certainly intimacy. On 24 January, for example, Clarinda wrote:

‘My heart reproaches me for last night. If you wish Clarinda to regain her peace, determine against everything but what the strictest delicacy warrants. ... Delicacy, you know, it was which won me to you .. : take care you do not loosen the dearest, most sacred tie that unites us.’<sup>14</sup>

Burns replied:

‘Now, my love, do not wound our next meeting with any averted looks or restrained caresses. I have marked the line of conduct – a line, I know, exactly to your taste –

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<sup>9</sup> The site is now covered by Edinburgh University’s Informatics Forum building, opened in 2008 on what had long been an eyesore, a gap-site car park.

<sup>10</sup> There is no modern scholarly edition of the whole correspondence and we must still rely primarily on William C McLehose (ed) *The Correspondence between Burns and Clarinda* (1843). A convenient, accessible but incomplete version is by Donny O’Rourke (ed) *Ae Fond Kiss: The Love Letters of Robert Burns and Clarinda* (2000), and citations below are generally to this collection. The Burns side of the correspondence is published to scholarly standards in J De Lancey Ferguson and G Ross Roy (eds) *The Letters of Robert Burns*, 2nd edn (1985); see also James A Mackay (ed) *The Complete Letters of Robert Burns* (1987) 370-412. For Sylvander and Clarinda as pseudonyms, see Mackay (n 6) 375-6; Crawford (n 6) 282.

<sup>11</sup> Mackay (n 6) 372-4; Crawford (n 6) 281.

<sup>12</sup> O’Rourke (n 10) 35.

<sup>13</sup> Ibid 35.

<sup>14</sup> Ibid 41.

and which I will inviolably keep; but do not you show the least inclination to make boundaries ...'<sup>15</sup>

And on 27 January Clarinda wrote: 'If you'd caress the mental intelligence as you do the corporeal frame, indeed, Sylvander, you'd make me a philosopher.'<sup>16</sup> Burns replied: 'Yesternight I was happy – happiness that the world cannot give. I kindle at the recollection ...'<sup>17</sup>

But the probability is that the affair remained a chaste one - frustratingly so for Burns, who however managed to work off some of the heat of his ardour with Clarinda's servant Jenny Clow, since she bore his child nine months later, in November 1788. Things certainly began to cool down with Clarinda once Burns left Edinburgh in mid-February and went off to Dumfries-shire, to pursue a career as a farmer and, later, an excise man, accompanied by the faithful Jean Armour, who was soon publicly acknowledged as his wife. A brief return to Edinburgh for Burns in mid-March 1788 may have led to a momentary renewal of the affair, possibly even some form of still more intimate embrace;<sup>18</sup> but thereafter Clarinda was mainly a memory for Burns, his ideal woman against whom all others fell to be judged.<sup>19</sup>

The Sylvander/Clarinda correspondence continued, however, although less frequently and ardently than before; and so Burns got to know late in 1791 that Nancy was to be reunited with her husband, the reprobate lawyer James McLehose, but in Jamaica where he now not only practised law but also owned a plantation, worked of course by slaves. It was this news that prompted Burns to write the famous song, 'Ae Fond Kiss', and send it in a letter bidding farewell to Nancy – possibly with the wry reflection that 'ae fond kiss' was as much as he had ever got from the woman.<sup>20</sup>

The McLehoses' reconciliation did not last, however – James' mistress amongst his female slaves and the child she had borne by him probably did not do much for Nancy's loyalty to him – and she was back in Edinburgh by summer 1792. But there were to be no further meetings with Burns after her return; instead Nancy pursued respectability and, by way of litigation, her husband's money.<sup>21</sup> Romantic affairs with already married men were not an option in such circumstances.

Burns died in Dumfries on 21 July 1796, leaving behind him his wife Jean and their surviving children. The supposition that the family was left destitute is quite inaccurate;<sup>22</sup> but nevertheless friends and admirers of the dead poet concocted a plan to support the family by publication of all his poetry and other writings, including his letters. They wanted initially to include in this project Burns' letters to Clarinda, which presumably they knew about because Burns had kept at least some of Clarinda's letters to him. She however refused permission for this, and on her own account asked for the return of the letters she had written to Burns. This

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<sup>15</sup> Ibid 43.

<sup>16</sup> Ibid 48.

<sup>17</sup> Ibid 49.

<sup>18</sup> See Crawford (n 6) 295-6, citing a Clarinda letter apparently to be dated 18 March 1788 and first published as No IX in 'Letters of Robert Burns' (1929) 4 (n.s.) *Burns Chronicle* 13 (not in O'Rourke (n 10)); see also McIntyre (n 6) 211. The letter is reprinted as an appendix to the 2009 facsimile reprint (n 5) and there re-dated to 5 February 1788.

<sup>19</sup> See further Sarah Dunnigan 'Burns and Women' in Gerard Carruthers (ed), *The Edinburgh Companion to Robert Burns* (2009) 20, 23-4.

<sup>20</sup> See O'Rourke (n 10) 93-4.

<sup>21</sup> See *ibid* 101-2, 111-15, for her subsequent career.

<sup>22</sup> Mackay (n 6) 632.

was eventually achieved in 1797.<sup>23</sup> Three years later, the first edition of James Currie's four-volume *Works of Robert Burns* was published by Cadell and Davies of London (the current members of a long-established and very successful firm of booksellers or publishers, later to be the raisers of the action that came to its culmination in May 1804<sup>24</sup>). The second volume included the full text of a number of Burns' letters recovered from some of his correspondents, but there was no hint anywhere in the book of his exchanges with Agnes McLehose.

Currie's quasi-apology for publishing private letters in his preface to the second volume is indicative of contemporary attitudes, at least among the letter-writing classes:

'It is impossible to dismiss this volume of the correspondence of our Bard, without some anxiety as to the reception it may meet with. The experiment we are making has not often been tried; perhaps on no occasion, has so large a portion of the recent and unpremeditated effusions of a man of genius been committed to the press.'<sup>25</sup>

Currie emphasized the fact that the publication was generally with permission from both the family of Burns and those to whom he had written, and also that it had been 'found necessary to mutilate many of the individual letters, and sometimes to examine parts of great delicacy - the unbridled effusions of panegyrics and regard',<sup>26</sup> to make them fit for public viewing.

Despite, or perhaps because of this, Currie's book caught the in-coming tsunami of Burns mania. Having begun at the massively attended funeral of the poet in Dumfries in 1796, bardolatry was already manifesting itself, not only in the spread of annual suppers on the anniversary of his birth (the very first was held in the birthplace, Alloway, in January 1797), but also in projects for the creation of monuments around the country.<sup>27</sup> Currie's *Works* enjoyed three further editions in 1801, 1802, and 1803, and the book's immediate success was, as we shall see, an important part of the background to the litigation in 1804.<sup>28</sup>

While Clarinda might successfully prevent her letters from Burns going into print, she did allow visitors to her house in Edinburgh to see them. She also authorised at least one would-be Burns biographer to *quote* from Sylvander's letters when she let someone called Finlay have possession of them for a period for this purpose; but, as she later wrote, in 1834,

'... under this expressed condition, that a few extracts inserted in the Life was the sole permission granted to him. Besides making this use of the letters, Mr Finlay gave permission to a bookseller to publish all the letters which had been intrusted to him,

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<sup>23</sup> See *ibid* 375, 646-7; O'Rourke (n 10) 120.

<sup>24</sup> For some context for Cadell and Davies at this time (not however considering the firm's involvement with the posthumous promotion of Burns' life and work), see Richard B Sher *The Enlightenment and the Book: Scottish Authors and Their Publishers in Eighteenth-century Britain, Ireland and America* (2006) 598-604.

<sup>25</sup> James Currie *The Works of Robert Burns with an Account of his Life and a Criticism on his Writings. To which are prefixed, Some Observations on the Character and Condition of the Scottish Peasantry* (1800) vol 2, v. See further Karina Williamson 'The Emergence of Privacy: Letters, Journals and Domestic Writing' in Ian Brown and others (eds) *Edinburgh History of Scottish Literature Volume 2: Enlightenment, Britain and Empire 1707-1918* (2007) 57.

<sup>26</sup> Currie (n 25) vol 2, vi.

<sup>27</sup> See Mackay (n 6) 630-89; McIntyre (n 6) 399-444. See also Clark McGinn 'Vehement Celebrations: The Global Celebration of the Burns Supper since 1801', and Christopher A Whatley 'Robert Burns, Memorialisation, and the 'Heart-beatings' of Victorian Scotland', both in Murray Pittock (ed), *Robert Burns in Global Culture* (2009) 189 and 204 respectively; and Sharon Alker and others (eds) *Robert Burns and Transatlantic Culture* (2012).

<sup>28</sup> Currie's compilation (n 25) went on to enjoy numerous further editions after 1804.

and added, most falsely, in an advertisement prefixed to them, that this was done with my permission ('condescension', as he termed it) ... Nothing could be more contrary to truth.<sup>29</sup>

The reference to 'condescension' makes it certain that Clarinda is here referring to the circumstances leading up to the 1802 publication, the anonymous introduction to which states: 'from the condescension of the Proprietor, we are enabled to favour the Public with an additional portion of the writings of our favourite Poet: nor is this condescension the effect of vanity, as from the letters themselves this Lady can never be discovered'.<sup>30</sup>

In the collections of Session Papers in the Advocates Library are to be found several copies of the printed pleadings in the Clarinda case.<sup>31</sup> At this time pleading in the Court of Session was primarily a written rather than an oral business;<sup>32</sup> and a party's written pleadings (or memorials), composed by his or her advocate, were printed in several copies, intended not only for the other side in the dispute but also the judges who would decide the case, as well as other lawyers who might have an interest such as law reporters and law professors. Thus there emerged several collections of such papers.<sup>33</sup> While simple kleptomania may explain some of them, the habit did have a practical justification, as a source of precedent and an aid to understanding decisions of the Court.<sup>34</sup>

The collecting habit means that not infrequently for significant cases we have several sets of the pleadings. The memorials in *Cadell and Davies v Stewart* are to be found in the collections of David Hume, Professor of Scots Law at Edinburgh University 1786-1822,<sup>35</sup> Sir Ilay Campbell of Succoth, Lord President of the Court of Session 1789-1808 (who therefore led the court that decided the case), and Robert Blair of Avonton, Campbell's successor as Lord President 1808-1811. In 1804, however, Blair was still Dean of the Faculty of Advocates (the leader of the Scottish bar) as well as Solicitor-General for Scotland, and he was involved in the case as one of the counsel for Cadell and Davies.<sup>36</sup> There is also a set in the Faculty Collection, begun in the mid-eighteenth century as a corporate effort by the

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<sup>29</sup> O'Rourke (n 10) 101. I have been unable to identify 'Finlay'. One possibility is John Finlay (1782-1810) who published *Wallace, or, The Vale of Ellerslie: with other poems* (1802) and *Scottish Historical and Romantic Ballads, chiefly ancient* (1808); for him see T F Henderson, 'Finlay, John (1782-1810)', rev Sarah Couper, *Oxford Dictionary of National Biography* (2004) [<http://www.oxforddnb.com/view/article/9465>, accessed 24 Sept 2012], and below, n 36.

<sup>30</sup> *Letters Addressed to Clarinda* (n 5) introduction.

<sup>31</sup> Advocates Library Session Papers [ALSP], Hume Coll[ection] vol 52 no 6; Blair Coll vol 65 no 113; Campbell Coll vol 114, nos 2, 3), and Faculty Coll Feb-July 1804 no 166. I have not searched other collections such as those in the Signet Library, Edinburgh.

<sup>32</sup> See further on Scottish procedure at the beginning of the nineteenth century David R Parratt *The Development and Use of Written Pleadings in Scots Civil Procedure* (Stair Society vol 48: 2007), chs 1 and 2; also Nicholas Phillipson *The Scottish Whigs and the Reform of the Court of Session 1785-1830* (Stair Society vol 37: 1990); John Finlay *The Community of the College of Justice: Edinburgh and the Court of Session, 1687-1808* (2012), especially chs 4-7.

<sup>33</sup> See further Angus Stewart QC 'The Session Papers in the Advocates Library' in Hector L MacQueen (ed) *Miscellany Four* (Stair Society vol 49: 2002) 199.

<sup>34</sup> *Ibid* 205-8.

<sup>35</sup> Hume, it may be noted, had previously given James Currie advice on aspects of Scots law relevant to Burns' life such as irregular marriage: see Currie (n 25), vol 1, Advertisement, xxiv.

<sup>36</sup> For Blair's involvement as counsel, see (1804) Mor, *Literary Property*, Appendix, 16. His father was the minor poet Robert Blair (1699-1746), whose work *The Grave* (1743) was republished in 1808 in an edition by John Finlay (above n 29) with illustrations by William Blake.

Faculty to facilitate the gathering and proper reporting of court decisions.<sup>37</sup> It seems to have been from this set that the report of the case later published in Morison's Dictionary was put together.

The Hume, Campbell and Blair copies of the pleadings are annotated in handwriting, presumably by the collectors themselves at the time. The fullest annotations are those of Hume, which carry a heading, 'Notes on advising informations 16 May 1804'.<sup>38</sup> The notes attribute comments to individual judges and were probably taken down by Hume while each spoke in turn as the case was 'advised', or decided by the court. Campbell's notes may have been either his thoughts on studying the memorials before the court came to determine the case, or summaries of a further oral argument in court in the presence of the judges. The final page certainly has brief notes of what can be recognised from Hume's notes as the opinions of Campbell's colleagues on the matter during their debate on how to decide the case.<sup>39</sup> Blair however provides only a short summary of what he took to be the decision of the court, and it is not clear how much of a part he played in the proceedings.<sup>40</sup> He was certainly not the author of the memorials composed on behalf of the family of Burns; as will be discussed further below, they were the handiwork of the much more junior George Joseph Bell.

The pleadings thus preserved show first that Stewart's counsel Archibald Fletcher argued that Clarinda had full and unfettered property in the letters written by Burns, and even if their publication was detrimental to Burns' reputation, that could not restrict the owner's legal use of her property.<sup>41</sup> Cadell and Davies had no entitlement to recover the letters themselves by way of a vindictory or a personal action such as the *condictio sine causa*; and could neither claim damages for their destruction nor restrain Clarinda from showing them to others. Nor was there any question of joint property in a letter as between the writer and the recipient. Fletcher rejected any argument based on public interest or policy: the court was one of law, not morals. Clarinda was the only person in existence who from feelings of delicacy and honour had an interest to withhold the letters from public view and she '*has consented to the publication*'.<sup>42</sup> This was, Fletcher concluded, 'a mere contest between booksellers as to which of them shall enjoy the profits of certain publications'.<sup>43</sup>

Cadell and Davies had acquired the copyrights to all Burns' published works after his death; hence their entitlement to republish in Currie's *Works*. But at this time copyright applied only to published works that had been registered at Stationers Hall in London; and obviously this did not apply to unpublished personal correspondence. So Cadell and Davies had an initial difficulty in establishing title to sue – what right of theirs was infringed? The only rights possibly involved seemed to be those of Clarinda – and for her to come forward would be to create scandal.

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<sup>37</sup> See Stewart (n 33) 211-15.

<sup>38</sup> ALSP, Hume Coll vol 52 no 6, 1-9. A curiosity is that the notes appear on a copy of the reclaiming petition dated 29 May 1804 made by Stewart against the decision of 16-17 May; possibly Hume transcribed earlier notes on to this document, for reasons not now apparent. The notes appear on the right-hand margins of the odd-numbered pages.

<sup>39</sup> ALSP, Campbell Coll vol 114 no 3.

<sup>40</sup> ALSP, Blair Coll vol 65 no 113.

<sup>41</sup> ALSP, Campbell Coll vol 114 no 3. For Fletcher see Anon *The Society of Writers to Her Majesty's Signet* (1936) 107; Grant (n 8) 72; Angus Stewart QC and David Parratt (eds) *Minute Book of the Faculty of Advocates Volume 4 1783-1798* (Stair Society vol 53: 2008), 97, 114, 116, 133, 140, 154, 188, 189, 190, 222, 273.

<sup>42</sup> ALSP, Campbell Coll vol 114 no 3, 15, 16 (emphasis in original).

<sup>43</sup> ALSP, Campbell Coll vol 114 no 3, 15.

The stroke of legal genius which enabled the defeat of Stewart's enterprise was to bring in the Burns family as co-petitioners alongside Cadell and Davies. The report of the case in Morison's Dictionary indicates that this meant Burns' brother Gilbert and a factor *loco tutoris* acting for his children.<sup>44</sup> Gilbert played an active, if not always distinguished, part in the development of Robert's fame after 1796.<sup>45</sup> Counsel who put together the winning arguments was, as already noted, George Joseph Bell. At this stage of his career he was still practising at the bar, although already well-known as the author of what would become the *Commentaries on the Law of Scotland*.<sup>46</sup> Nearly twenty years later he would succeed Hume in the Edinburgh Chair of Scots Law, from which in 1829 he would publish the first edition of his student textbook, *Principles of the Law of Scotland*.<sup>47</sup>

Bringing the Burns family into the Clarinda case made possible an argument based on their interest in preventing damage to Burns' character and reputation.<sup>48</sup> The argument built on the still developing law of what we would now call personality rights, the protection of body, reputation and dignity (*corpus, fama and dignitas*) against the crime and delict of *iniuria*. This of course drew upon Roman law and the *ius commune* of the medieval and early modern period, while also developing its own particular characteristics.<sup>49</sup> The concept of *iniuria* included the unauthorised disclosure of another's secrets.<sup>50</sup> *Animus iniuriandi*, or malicious intent, on the part of the wrongdoer was generally required, distinguishing the claim from the Aquilian negligence liability still in the process of being firmly recognised in the Court of Session in 1804.<sup>51</sup> Damages, increasingly referred to as '*solatium*', might be recovered for the hurt to feelings caused by the wrong or 'injury', while it was also possible to claim for any patrimonial loss that had been caused.<sup>52</sup>

Fundamental to personality rights, however, was their absolutely personal nature, with any right, in general, dying with the person unless an action in respect of any infringement had been raised in the person's lifetime.<sup>53</sup> By 1802, when Mr Stewart's publication appeared, Burns had been dead for six years. In order to succeed, therefore, Bell had to persuade the court that Burns' family also had rights that were directly infringed by Stewart's publication. Although Scots law already recognised what Blackie describes as 'rights of certain family members in the integrity of family life'<sup>54</sup> as an aspect of personality rights, these generally concerned marital and parent-child relationships quite different from the situation in which

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<sup>44</sup> (1804) Mor, *Literary Property*, Appendix, 13. The factor (also termed curator in the sources) was William Thomson of Moat, writer, Dumfries (ALSP, Campbell Coll, vol 114 no 1). See further John Finlay (ed) *Admission Register of Notaries Public in Scotland 1700-1799* (forthcoming) no 2773.

<sup>45</sup> See Mackay (n 6) 649, 665, 669-72.

<sup>46</sup> Between 1800 and 1804 Bell published a two-volume *Treatise on the Law of Bankruptcy in Scotland* which in its second volume assumed the title given in the text above.

<sup>47</sup> See Kenneth G C Reid 'From Text-Book to Book of Authority: The *Principles* of George Joseph Bell' (2011) 15 *Edinburgh LR* 6.

<sup>48</sup> ALSP, Hume Coll vol 52 no 6.

<sup>49</sup> See generally John Blackie 'Unity in Diversity: the History of Personality Rights in Scots Law' in Niall R Whitty and Reinhard Zimmermann (eds) *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 31.

<sup>50</sup> Blackie (n 49) 71-5, 127-8 (also referring to the Clarinda case).

<sup>51</sup> See Hector L MacQueen and W David H Sellar 'Negligence', in Kenneth Reid and Reinhard Zimmermann (eds) *A History of Private Law in Scotland* vol 2 (2000) 517, 526-30.

<sup>52</sup> Blackie (n 49) 82-93.

<sup>53</sup> Niall R Whitty 'Overview of Rights of Personality in Scots Law' in Whitty and Zimmermann (n 49) 147, 215-17.

<sup>54</sup> Blackie (n 49) 65.

the Burns family now found itself.<sup>55</sup> So Bell here seems to have been striking out in a novel direction.

His memorial asserted that the family had a patrimonial interest, since the letters and Burns' reputation had commercial value, providing his family with 'a fund of subsistence'<sup>56</sup> of which it would be unjust to deprive them. But probably Bell placed greater weight on the family's non-pecuniary interest in their deceased relative's reputation. Their interest and duty was to conceal, not expose, the defects of Burns' character. They had consented to Currie's publication of other letters only subject to 'most necessary and valuable censorship';<sup>57</sup> a claim which, as we have already seen, seems to have been true.<sup>58</sup> The Clarinda letters, on the other hand,

'... never were intended for the public eye, and which, published as they have been without reserve or delicacy, or the correcting hand of a friendly editor, are, in many respects, unfit for the public, unworthy of Burns, and disagreeable and hurtful in the eyes of every friend of him or of his family. ... Whether the memorialists should ever have been induced to consent to the publication of the letters in question, under any retrenchments, would have been a matter of serious consideration: Certainly to the publication, in its present shape, they never could have given their consent.'<sup>59</sup>

Bell also offered an argument based on public policy and the understanding that the *iniuria* of 'breach of confidence'<sup>60</sup> was not only a delict but also a crime as a betrayal of trust; a claim of legal right could not be based on a crime. While these arguments may have chimed with prevailing contemporary mores about the publication of private material (journals as well as letters), Bell may well have felt that the family's earlier consent to publications of other Burns letters, no matter how sensitively done, made it unwise to rely on such feelings alone. Hence, it may be suggested, the argument against Stewart needed the reinforcement provided by further reference in Bell's pleadings to relatively recent English and Scottish case law on rights in relation to private correspondence, in particular *Pope v Curl*,<sup>61</sup> *Duke of Queensberry v Shebbeare*,<sup>62</sup> and *Dodsley v McFarquhar*.<sup>63</sup>

In *Pope* and *Queensberry* the English courts had held that the recipient of a letter acquired only limited property rights in it with no right to use it in any way other than as a manuscript, and that a prohibitory injunction could be granted to prevent infringement of these limits. In the complex Scottish case of *Dodsley*, the right of the authorised English publishers of the Earl of Chesterfield's letters to his son Philip Stanhope to prevent unauthorised republication of them by Scottish publishers had been upheld by way of interdict (the Scottish equivalent of the injunction). This seemed to recognize that both the Earl's executors and the son's widow (whose consent had also been given to the English

<sup>55</sup> Ibid 68-70, 124-7.

<sup>56</sup> ALSP, Hume Coll vol 52 no 6, 17.

<sup>57</sup> Ibid 19.

<sup>58</sup> See above, 000; and for Gilbert Burns' involvement in the production of the Currie collection (n 25), see the Dedication to Captain Graham Moore of the Royal Navy, vol 1, xxi.

<sup>59</sup> ALSP, Hume Coll vol 52 no 6, 2, 19.

<sup>60</sup> Ibid 15.

<sup>61</sup> (1741) 2 Atk 342. See further on this case Ronan Deazley *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (2004) 69-74.

<sup>62</sup> (1758) 2 Eden 328. See further Deazley (n 61) 74 n 120.

<sup>63</sup> 1775 Mor 8308; more fully at *ibid*, *Literary Property*, Appendix, 1-6. Bell also cited the Second Phillipic, in which Cicero criticises the publication of his letters by Mark Antony as 'destroying all companionship in life, destroying the means by which absent friends converse together' (ALSP, Campbell Coll vol 114 no 2, 13).

publication) had rights in relation to the letters, even if these were now being exercised by their licensee rather than directly. Indeed the Earl's executors had initially been successful in the English courts in obtaining an injunction against publication before then giving their consent to it. But the English approach through a limited form of property right for the letter's recipient, was not attractive for Scots law, under which property, or ownership, was the most absolute kind of right. Thus in Scotland any parallel conclusion would have to be given a different legal rationale.<sup>64</sup>

Another key point, not directly discussed in Bell's memorial, was that all these cases involved the remedy of injunction or interdict, rather than damages; and we know from other Session Papers that an initial damages claim against Stewart was dropped, with the action thereafter being confined to one of interdict.<sup>65</sup> The general availability of 'suspension and interdict' as a preventative remedy against prospective or ongoing wrongdoing of all kinds was essentially a development of the later eighteenth century.<sup>66</sup> *Dodsley v MacFarquhar* seems not to have been much noticed before 1804, being only briefly reported in Lord Woodhouselee's supplementary volumes (published in 1797) to Kames' *Folio Dictionary*.<sup>67</sup> The much fuller report produced in the 'Literary Property' appendix to Morison's *Dictionary* was presumably the result of so much importance being attached to the case in *Cadell and Davies v Stewart*.

The deliberations of the judges of the Court of Session as recorded by Hume look more like a discussion between them than a series of individual judgments prepared in advance with the outcome determined by what found favour with the greatest number.<sup>68</sup> The first to speak, Lord Hermand, seems almost to be opening a debate rather than giving a concluded opinion, while on the whole leaning towards the arguments put forward by Archibald Fletcher. Hermand began with the observation that Clarinda was admitted to have consented to the publication. The law relating to manuscripts in general (i.e. that the author was the owner) had no application to letters, which were given to their correspondents. Should the latter publish so as to cause damage, then an action would lie; but he also might burn them with impunity. For that reason it was difficult to see what sort of property could remain with letter-writers like Burns; they could have neither a vindication nor a *condictio* (i.e. restitution) in respect of the letters they wrote and sent. Hermand noted that the *Curl* case was one of injunction only, while in the *Dodsley* case Lord Chesterfield's letters had

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<sup>64</sup> See Hector L MacQueen 'Intellectual Property and the Common Law in Scotland c1700-c1850' in Catherine W Ng and others (eds) *The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver* (2010) 21, 39.

<sup>65</sup> This information emerges from another memorial by Bell (ALSP, Hume Coll vol 52 no 5, Information *Cadell and Davies v James Robertson*, 30 Sept 1803) in the parallel case of *Cadell and Davies v Robertson* (1804) Mor, *Literary Property*, Appendix No 5 (first decided also on 16 May 1804 and then reclaimed and finally decided on 18 December; here the publishers were refused damages for unauthorized republication of some of Burns' poems). Interleaved before the collection of papers for the Clarinda case (ibid, no 6) is a 16-page manuscript note of the judges' views on the Robertson case as delivered on 16 May. I hope to study this document in detail on another occasion.

<sup>66</sup> The history of the remedy of suspension and interdict has been little explored but see Hector Burn-Murdoch *Interdict in the Law of Scotland, with a Chapter on Specific Performance* (1933) 6-9; Daniel Visser and Niall Whitty 'The Structure of the Law of Delict in Historical Perspective' in Reid and Zimmermann (n 51) 422, 470-2.

<sup>67</sup> See *Folio Dictionary* vol 3 (1797) 388, reproduced (1775) Mor 8308. On Woodhouselee's contribution to the *Folio Dictionary* reports series, see David M Walker *The Scottish Jurists* (1985) 224.

<sup>68</sup> ALSP, Hume Coll vol 52 no 6, 1-9 (see n 38).

already been published. Possibly echoing an oral observation by Bell,<sup>69</sup> Hermand commented that it was said to be a vulgar (i.e. commonplace) error that there was no literary property but by statute; but, Hermand added, he was out of that vulgar school. The Lord President's note summarises the thrust of Hermand's opening comments as 'Receiver of the letter has the right of publishing'.<sup>70</sup>

Lord Meadowbank on the other hand was of the contrary view, as the Lord President also noted.<sup>71</sup> Hume's record shows Meadowbank saying that it was 'clear and settled law that any correspondent has no right to publish my letter'.<sup>72</sup> This for him was 'common sense'.<sup>73</sup>

'To publish private letters! What is it but to betray? What but a violation of confidence? And has not a son the right of defending his father's fame? Again, taking another view of the matter, if letters [are] in the hands of friends a son may say, *if* to be published, I shall be the Editor. Here the brother of the poet claims the right.'<sup>74</sup>

Meadowbank was therefore clear that 'a wrong is done by this unauthorized publication'.<sup>75</sup>

From Hume's notes, Clarinda's cousin Lord Craig seems to have given one of the longest opinions; or it may simply be that Hume, knowing of Craig's personal interest in the case, paid more attention to his words than those of others.<sup>76</sup> Craig doubted whether the booksellers (Cadell and Davies) had any right to claim interdict, or even if the author of the letters or his executors had any title to sue in a *vindicatio* for publication by himself. Private letters were confidential to both parties and could be published by neither. He declined to go into the question of 'whether the Lady consented to the publication or not'.<sup>77</sup> His position was that private letters, not being written for publication, should not be published without the *writer's* consent, and he expressed himself in strong and vehement terms showing that a perception of trash-can journalism is nothing new:

'Is what I write confidentially to be prostituted to the perusal of the whole world; a use never dreamed of by the writer. Many letters [have been] published of late which were meant to be private and confidential. Closets are ransacked – pretended friends induced to give up letters – the morals and manners of the age would not suffer if an active stop were put to all such publications.'<sup>78</sup>

It seems highly likely that Lord Craig was well aware of the risk under which his cousin stood if the publication went ahead, and that all the work which had gone into keeping her and her family respectable over the previous twenty years might go to waste and worse.

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<sup>69</sup> Bell's memorial includes a passage about the author's exclusive right of property in an unpublished work which rests upon a labour theory, gives a right of control up to publication, and ceases upon publication.

<sup>70</sup> ALSP, Campbell Coll vol 114 no 2, 19 verso.

<sup>71</sup> Ibid.

<sup>72</sup> ALSP, Hume Coll vol 52 no 6, 1.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid 1-3.

<sup>75</sup> Ibid 3.

<sup>76</sup> Ibid 3-7.

<sup>77</sup> Ibid 5.

<sup>78</sup> Ibid 5-7.

The remaining opinions were briefer, at least as Hume noted them down. Lord Bannatyne thought the matter was not so much an issue of literary property as of the confidentiality of communications. Neither party could publish, while the honour and character of a man could be protected by his family. In this case it was merely an interdict which was sought.<sup>79</sup> Lord Balmuto was ‘clear for granting the interdict’,<sup>80</sup> while the Lord President stated, perhaps picking up Bell’s public policy argument, that he could ‘conceive of nothing so infamously bad as this sort of breach of confidence – and it is in my opinion the absolute bounden duty of courts to interfere to prevent it’.<sup>81</sup> He also noted that in *Dodsley v McFarquhar* consent to publication was given by Lord Chesterfield’s heirs. Finally, the previously contrary Hermand declared himself ‘satisfied by what I have heard’<sup>82</sup> (the Lord President scribbled on his papers, ‘Hermand retracts his opinion’<sup>83</sup>), and the court, according to Hume, was ‘unanimous in granting the interdict’.<sup>84</sup>

The judges therefore upheld Bell’s arguments and in an interlocutor dated 17 May 1804 continued the interdict granted by the Lord Ordinary.<sup>85</sup> The Lord President noted on his copy of Bell’s memorial: ‘expenses to Burns’ heirs but not to the Booksellers’,<sup>86</sup> and this too was confirmed in the court’s interlocutor, thus indicating who had won the case as well, perhaps, as the court’s disapproval of Cadell and Davies. A reclaiming petition for Stewart was rejected by the court without requiring answers on 29 May.<sup>87</sup>

The reporter for Morison’s Dictionary summarised the decision as follows:

‘... that the communication in letters is always made under the implied confidence that they shall not be published without the consent of the writer, and that the representatives of Burns had a sufficient interest, for the vindication of his literary character, to restrain this publication.’<sup>88</sup>

Robert Blair however noted on his copy of Bell’s memorial, perhaps in his own summation of the decision, that it meant there was ‘no right to publish private Letters without the consent both of Writer and Receiver or their Heirs’.<sup>89</sup> From Hume’s notes this was certainly the view of Lord Bannatyne; but it may also have been the view of the Lord President since on his copy of Bell’s memorial he made two notes to that effect. It would be interesting to know whether he wrote them while reading the papers before going into court, or as jottings during the actual hearing, or as aides memoire before giving his oral opinion. The first note cited *Dodsley v McFarquhar* and stated: ‘Mr Stewart has no right to publish these private letters without the consent, not only of the person to whom they were directed, but also of the heirs of the writer of them.’<sup>90</sup> The second note stated:

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<sup>79</sup> Ibid 7.

<sup>80</sup> Ibid 7.

<sup>81</sup> Ibid 9.

<sup>82</sup> Ibid 9.

<sup>83</sup> ALSP, Campbell Coll vol 114 no 2, 19 verso.

<sup>84</sup> ALSP, Hume Coll vol 52 no 6, 9.

<sup>85</sup> For the interlocutor see (1804) Mor, *Literary Property*, Appendix, 16.

<sup>86</sup> ALSP, Campbell Coll vol 114 no 2, 1.

<sup>87</sup> Archibald Fletcher’s memorial in the reclaiming petition is ALSP, Campbell Coll vol 114 no 1. See (1804) Mor, *Literary Property*, Appendix, 16, for the court’s refusal of the petition.

<sup>88</sup> Ibid.

<sup>89</sup> ALSP, Blair Coll vol 65 no 13, 1.

<sup>90</sup> ALSP, Campbell Coll vol 114 no 2, 1.

‘A Manuscript before publication was admitted on all hands to be private property and none but the proprietor can have a right to publish – This follows from the nature of the Subject at common law independent of any Statute, and in the case of private letters of correspondence there are in effect two parties concerned, the writer and the receiver, without whose joint concurrence it would be a flagrant breach of confidence to publish them.’<sup>91</sup>

Like Hume, the Lord President also briefly – and presumably contemporaneously - noted Craig’s comment that ‘neither party have any such right [to publish] without consent of the other’,<sup>92</sup> for him clearly the key passage in his colleague’s opinion.

All this illustrates the difficulty of determining the precise significance of any Court of Session decision at this time, since we do not know what if anything the other judges said on the point. For our present purposes, however, the vital conclusion was that the Court had no need to investigate whether or not Clarinda had given her consent to the publication, or indeed to identify her in any way. What mattered was that neither Burns nor his family had given any consent to publication. The result of the decision was that Mr Stewart’s publication was withdrawn (although it may still be consulted today in the National Library of Scotland<sup>93</sup>). But the court order of course only applied in Scotland; and it is reminiscent of what happens in modern cases of this kind that the letters were almost immediately published outside the jurisdiction, in Belfast. Between 1806 and 1820 at least eleven editions of Burns’ letters to Clarinda were produced, in Ireland, London and the USA.<sup>94</sup> The collection must have been so well-known that from 1820 on it began to be reprinted and sold in Scotland without any apparent legal check or hindrance,<sup>95</sup> even though Clarinda was still alive – she finally died in 1841, aged 82. Whereupon her grandson trumped the market by publishing in 1843 not only the Burns letters but also the Clarinda side of the correspondence.<sup>96</sup> The matter of family scandal and shame had become one for family pride – and, no doubt, financial gain.

I have explored elsewhere how Hume and Bell analysed the law in their subsequent writings, and the gradual failure of the *actio iniuriarum* analysis in the nineteenth century in the face of growing acceptance of the limited property rights approach to unpublished correspondence.<sup>97</sup> In the twentieth century the discussion was superseded by the expansion of copyright law to cover unpublished as well as published material.<sup>98</sup> The idea of family personality rights gained ground in *Walker v Robertson* in 1821,<sup>99</sup> where the surviving son of a deceased person was awarded solatium of £100 for hurt to feelings arising from the defamation of his late father; but doubt was cast on the authority of this decision by the Second Division of the Court of Session in 1904, and the law remains unclear.<sup>100</sup> Perhaps the

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<sup>91</sup> Ibid 2.

<sup>92</sup> Ibid 19 verso.

<sup>93</sup> The Library holds two copies, call numbers L.C.1641 and F.7.f.31(2).

<sup>94</sup> Lamont Brown (n 6) 257 gives a list.

<sup>95</sup> Ibid, noting publications in Glasgow in 1822 and 1828, and in Edinburgh in 1828.

<sup>96</sup> See n 10 above.

<sup>97</sup> MacQueen (n 64) 40-1.

<sup>98</sup> Copyright Act 1911, s 1; and see now Copyright, Designs and Patents Act 1988, ss 1-3, which impose no requirement of publication before a work may enjoy copyright.

<sup>99</sup> (1821) 2 Mur 516, sequel to 2 Mur 508.

<sup>100</sup> See *Broom v Ritchie* (1904) 6 F 942; Whitty (n 53) 204; Elspeth C Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010), paras 10.59-10.61.

current revival of interest in personality rights in Scots law will lead to clarification or a return of some of the older ideas in this area.<sup>101</sup>

The only question left is, to what if anything did Clarinda consent with regard to the letters, especially after Burns' death in 1796 and the rapid growth of the Burns cult in the years that followed? She certainly realised the value of possessing the letters from early on. In 1791 Burns wrote to her, saying, presumably in response to some comment on her side,

‘How can you expect a correspondent should write you, when you declare that you mean to preserve his letters, with a view, sooner or later, to expose them on the pillory of derision, and the rack of criticism? This is gagging me completely, as to speaking the sentiments of my bosom ...’<sup>102</sup>

Clarinda indignantly refuted him: ‘In an impassioned hour I once talked of publishing them, but a little cool reflection showed me its impropriety: the idea has been long abandoned.’<sup>103</sup> But perhaps the lady did protest too much, then and later. We have seen how, perhaps naively, she allowed would-be biographers of Burns post-Currie to have access to the material. There are hints in her correspondence with other people after Burns' death that she contemplated publishing the letters herself – e.g. in 1797, ‘I will select such passages from our dear bard's letters as will do honour to his memory and cannot hurt my own fame, even with the most rigid.’<sup>104</sup> In another letter that year she mentions ‘the idea of [Burns' letters] affording [her] pecuniary assistance’, but then says she gave that up, ‘as few would be interested’,<sup>105</sup> i.e. she would not make much money from publication. But the huge success of Currie may have changed her thinking again. There was no direct challenge in the 1804 litigation to the claim that she had consented to Stewart's publication, the pleadings for the pursuers simply –

‘... question[ing] the possibility of the lady, to whom these letters are addressed, having put them into the hands of a printer, to be laid before the public. They have privately heard [from Clarinda herself, perhaps?], that the letters came into Mr Stewart's hand for no such purpose, and with no intention of publication: and that he took advantage of the power, which an accidental possession gave him, to print and publish them.’<sup>106</sup>

There is significantly little detail here about how Mr Stewart came into his ‘accidental possession’ or the ‘purpose’ with which the letters were handed over to him. Also of interest in this regard is the offer in the anonymous introduction to Stewart's edition:

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<sup>101</sup> Note *Stevens v Yorkhill NHS Trust* [2006] CSOH 143, 2006 SLT 889 (in which the mother of a deceased baby was held to have a claim in respect of the unauthorised removal of the child's organs at a post mortem and their subsequent preservation for research purposes); and the preceding discussion in Niall R Whitty ‘Rights of Personality, Property Rights and the Human Body in Scots Law’ (2005) 9 *Edinburgh LR* 194. See also the Scottish Government consultation, *Death of a Good Name: Defamation and the Deceased* (January 2011, available at <http://www.scotland.gov.uk/Publications/2011/01/11092246/0>), on which see further the summary of responses at <http://www.scotland.gov.uk/Resource/Doc/254430/0121368.pdf>, and the governmental decision in October 2011 to take no action for the moment, available at <http://www.scotland.gov.uk/Resource/Doc/254430/0123401.pdf>.

<sup>102</sup> O'Rourke (n 10) 88.

<sup>103</sup> Robert Chambers and William Wallace *The Life and Work of Robert Burns* (1896) vol 3, 273-4 (found quoted in McIntyre (n 6) 283; not in O'Rourke (n 10).

<sup>104</sup> O'Rourke (n 10) 120.

<sup>105</sup> Ibid 121.

<sup>106</sup> ALSP, Campbell Coll vol 114 no 2, 2.

‘Should any person suspect that [the letters] are not the genuine productions of the Bard, he may have his doubt removed by applying to the Publisher, in whose possession the originals are permitted to remain for one month after publication.’<sup>107</sup>

Such a claim would have been difficult to sustain without at least some acquiescence from Clarinda, although perhaps Stewart had confidence that she would not wish to reclaim the letters publicly from him, and he would meantime have made his profit.

So there is something of a mystery about the beautiful Clarinda's real role in the publication of her lover's letters. Like the nature of the intimacy she and Burns enjoyed in Potterrow in early 1788, this is likely to remain for ever unresolved. Bell's comment in his memorial – ‘she is safe from all obloquy; *stat nominis umbra*; she is concealed under a veil of impenetrable mystery’<sup>108</sup> – might almost, if not quite, serve as her epitaph. Perhaps it is appropriate to finish in the Canongate Kirkyard, just off the Royal Mile in Edinburgh. There Agnes McLehose lies buried, her grave alongside that of the cousin who may have done more than anyone else to save and protect her reputation in 1804, William Lord Craig, Senator of the College of Justice. Overshadowing them both from the north, however, looking down from the Parnassus that is Calton Hill, is the Edinburgh monument to Robert Burns.

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<sup>107</sup> *Letters Addressed to Clarinda* (n 5) introduction.

<sup>108</sup> ALSP, Campbell Coll vol 114 no 2, 19.