

1756. June 20.

DAVID KINLOCH *against* DAVID ROBERTSON.

DAVID KINLOCH had a house in Kinloch's close, betwixt which and the house adjoining to it there was a common gable. The second floor of this last house was vaulted, and was used by Robertson, a blacksmith, as a working-shop. There were in this shop five forges and twenty workmen, who worked in it twelve hours in the day.

David Kinloch pursued Robertson to remove his working-shop, as the situation of it, in so public a place of the town, to the disturbance, and even danger of the neighbours, was contrary to the public police of the burgh.

"THE LORDS decerned Robertson to remove."

Act. *J. Dalrymple, Lockhart.*

Alt. *M^cQueen, A. Pringle.*

J. D.

Fol. Dic. v. 4. p. 199. Fac. Col. No 206. p. 304.

* * * Lord Kames reports this case :

1756. December 9.—DAVID KINLOCH of Gilmerton applied to the Dean of Guild of Edinburgh, setting forth : " That he is proprietor of a tenement in Kinloch's close, the west gable of which is common betwixt it and another tenement belonging to Mr Adam, architect, within the head of Niddery's wynd, the third story of which is possessed by David Robertson blacksmith, who keeps a forge upon the floor; and, by continual beating, not only annoys the petitioner's tenants and other neighbours, but likewise, by the force of his hammers, and other heavy instruments, endangers the said gable; and therefore praying, That the Dean of Guild would ordain the said forge to be removed." David Robertson put in his answer to this petition, setting forth, That the tenement which he inhabits is vaulted in the under part, having been originally intended for tradesmen; that the first story immediately above the vault is paved with stone, which removes all hazard of fire or other danger; and that he has accordingly possessed the same for six years, without any damage to the tenement, or to the neighbourhood. The Dean of Guild, upon inspection, having dismissed the complaint, the cause was advocated; and a proof being appointed before answer, it came out, that Mr Robertson employed five forges, that he had generally eighteen or twenty men at work, that the hammers they wrought with were from four ounces to sixteen pounds, and that the noise gave considerable disturbance to the neighbourhood.

At advising, the argument turned upon this point, Whether the disturbance given to the neighbourhood by the noise of a forge be a sufficient reason for obliging a smith to remove? The defender *insisted* that it was not, for this reason, That every man has the free use of his own property, and that inconveniency to a neighbourhood is no just cause for depriving him of it. The neighbours may remove if so delicate as not to submit to such inconvenience.

No 8.

A blacksmith who had his forge in the second story of a vaulted house, was decerned to remove it as a nuisance.

No 8. Numberless instances occur, in this very city, of wrights and smiths in every quarter, and of brewers and bakers, whom no person has ventured to complain of, though brewing and baking in particular cannot be carried on without more than ordinary danger of fire. A case similar to the present occurred in the year 1719. Forrester carried on his business as white-iron smith in an upper story. Gibb complained of the noise occasioned by the hammering. The cause was brought before the Court of Session, and the complaint was dismissed. The like attempts have been made with regard to goldsmiths, and to dancing-masters, but unsuccessfully; because every man may use his own property, provided it be not done *in emulationem*, or against the public law of the land. See APPENDIX.

The pursuer admitted the maxim, but *contended*, That property within burgh is an exception; because the public police and general good of the inhabitants must preponderate private property; and that otherwise the living within burgh might be rendered extremely incommodious. Hence it is, that the Magistrates of a burgh are empowered to remove to distant parts the exercise of any lawful occupation attended with danger. The making of candles is not only innocent but necessary. The business of a distiller is at least innocent; and yet Magistrates are daily in practice to remove these occupations to distant places where there is little or no danger of fire. The public police of a burgh equally requires that a forge be not set up in the second or third story of a tenement, to the disturbance of the neighbourhood; and which, during sickness especially, becomes intolerable; and there is the less hardship in this restriction, because the ground-story is the proper place for a forge, which there produces no concussion, and very little noise.

“THE COURT was of opinion, That the working with a forge in an upper story is a nuisance; and, therefore, the defender was ordered to remove at the next term.”

The connection of close neighbourhood in a burgh introduces new duties among the inhabitants. Neighbours in towns must submit to ordinary inconveniencies from each other; but they must be protected against extraordinary disturbances, such as may render their property useless to them, or at least uncomfortable. Close neighbourhood introduces this temperament in equity, but not in such a manner as to deprive his neighbour of the use of his property. The only difficulty in matters of this kind is to bring this temperament under a general rule. If this cannot be done, the matter must be left to the discretion of Judges; for, when a man exceeds just bounds in the use of his property, justice demands a remedy.