

No 17. to the house. A distinction should be made between what is fixed, and what not. Damage done to the first should only be repaired.

“ THE LORDS found the defender liable for the damage done to the house, but not for that done to the furniture. See APPENDIX.

Reporter, *Auchinleck.* Act. *Henry Dundas.* Alt. *Montgomery.*  
*J. M.* *Fol. Dic. v. 4. p. 197.* *Fac. Col. No 15. p. 25.*

1769. *March 7.*

MARGARET, ELIZABETH, AGNES, and ISOBEL GARIOCHS, against Mr ROBERT KENNEDY.

No 18.

*Stillicide.*

THE LORDS refused a petition, reclaiming against an interlocutor of the Ordinary upon the bills, refusing a bill of advocation of a decree of the Dean of Guild of Edinburgh, by which it had been found, that, though 18 inches must be left free between two buildings in burgh, where there are two eave-drops, yet, where the new building is so constructed, as that there is but one eave-drop, nine inches are sufficient.

This rule, it was observed upon the Bench, is not founded in written law, but upon general custom.

Act. *W. Baillie.* Alt. *A. Fergusson.* Clerk, *Kilpatrick.*  
*G. F.* *Fol. Dic. v. 4. p. 198.* *Fac. Col. No 96. p. 176.*

1774. *November 15.*

JAMES BUCHANAN, Dean of Guild of Glasgow, against PATRICK BELL.

No 19.

Whether the dean of guild has power to make general regulations for removing what, though not strictly a nuisance, may be deemed a deformity, and prove discommodious to the inhabitants and the public in general?

MANY of the inhabitants of Glasgow had a practice of fixing large shades, or water-barges, on the fronts of their houses, in order to convey the water from them. It was represented to the Dean of Guild, That these water-barges were exceedingly prejudicial; that not only they were ugly to the eye, and hurt the regularity and beauty of the streets, but, by projecting considerably beyond the houses, they encroached upon the street, and rendered it in some places very narrow; that, besides, they collected the water which fell upon the tops of the houses, and threw it out upon the streets, by which means the streets were often covered with water, and the rain, so collected in these water-barges, was poured upon the inhabitants, as they passed along the streets.

This matter being enquired into by the Dean of Guild Court, in April 1773, the Court ordered these water-barges to be taken down against the 1st of May;

and this order, being published in the Glasgow newspapers, was generally complied with.

Patrick Bell, however, proprietor of a house in the Gallowgate of Glasgow, proving refractory, he was called before the court to answer for his contempt of said order; and he having appeared, and his tenement being visited and inspected by the Dean of Guild and his brethren, they ordained Bell, betwixt and a certain day, to remove and take down his water-barge. But, instead of complying with this order, he brought the matter before this Court by a suspension.

*Pleaded* for the charger; In the present case, the order of the Dean of Guild Court was indisputably competent; for that, by law, the care of the police within burgh, the regulation of public buildings, and of every thing which can incommode, obstruct, or encroach upon the public streets, properly belongs to this Magistrate; and as the usage of those barges was attended with no real utility, but was exceedingly hurtful to the police of the burgh, and was a real nuisance, and as such universally complained of, it was the duty of the Dean of Guild to put an end to it, and enforce their own authority, when brought in question by an individual merely from humour.

In point of fact, the suspender set forth, That, having lately caused the dimensions of his barge to be measured by two tradesmen of character, from whose report it appears, that the breadth or projection thereof, from the side-wall of the tenement, is only two feet nine inches; that, besides, the stair of the tenement projects farther out towards the street than the barge, and receives the rain-water which falls from it, so that it is clear the inconvenience which inhabitants and passengers are said to suffer, are imaginary, and only assumed in order to afford some excuse for the proceedings of the Dean of Guild: And, *argued*,

The Dean of Guild is no doubt empowered by law to take cognizance in questions relating to the police of the burgh; but, in doing so, he is bound, like all other judges, to decide according to the rules of law, and not to be led away by his own private ideas of utility or expediency. Both the house and barge in question were erected in the year 1734; and, since that time, the barge has subsisted in its present form till the month of April 1773; and, among the inhabitants of Glasgow, the practice of having such barges has been general and immemorial. But, supposing the water-barge in question to be ever so late an erection, how does it appear that the same is a public nuisance which the Dean of Guild was entitled to take down? That it was no such nuisance is extremely clear, unless it shall be held a nuisance, or trespass against the public police, for a person to attempt protecting his shop from the rain-water, without doing the least hurt or injury to the public.

The Court were of opinion, *imo*, That this was a case in which there were no *terminis habiles* for a plea of prescription, supposing the water-barge had, by toleration or the negligence of the Magistrate, stood even for 40 years, which

No 19.

was not the fact; *2do*, That although the Dean of Guild can make no arbitrary regulations, tending to deprive a person of his property, yet he has certainly discretionary powers in the matter of police, and particularly *ne opere manufacto-aut aliquo immisso urbs deformetur*; and the regulation in question fell within those powers, in the exercise of which that useful Magistrate ought to be supported; and, *3tio*, That, even from the suspender's own account of the matter, it was humoursome in him striving to keep up what in reality is of no benefit to him; which was also confirmed by one of the Judges, who had, when on the circuit, inspected the subject along with his colleague.

THE COURT "found the letters orderly proceeded."

Act. *W. Craig.*Alt. *Blair.*Clerk, *Campbell.*

*Fol. Dic. v. 4. p. 260. Fac. Col. No 136. p. 160.*

No 20.

What damages may be awarded under the riot act—on whom—and who to be levied?

1775. February 17. THOMAS MYLNE *against* The COUNTY of PERTH.

MR MYLNE instituted an action against the County of Perth, called by edictal citation, founding upon the statute 1st Geo. I. chap. 5. and concluding for reparation of the loss sustained by a mob who attacked his house at Mylnfield, in the county of Perth, and, as he set forth, almost totally demolished the fabric of the house, destroyed a large quantity of silver plate, papers, and other valuable articles, and plundered and carried off other articles to a considerable value, amounting, the said loss and damage, as by particular condescence and list, to L. 403 Sterling.

The Court had no doubt that the act extended to Scotland. Neither was this a new case, having formerly occurred between Straiton and the Magistrates of Montrose, 28th January 1743, See APPENDIX.; and again, Mouat against the Town of Edinburgh, June 19th 1765, No 17. p. 13176. The only question was, to what extent damages could be here awarded; on whom they were leviable; and by what mode the sum found due was to be assessed; As to which, upon the authority of the above precedents, and it being farther observed on the Bench, that penal statutes operating against innocent persons for the offences of others, are not to be extended beyond their precise words,

The Court pronounced the following judgment:

"THE LORDS find it averred by the pursuer, and not denied by the defenders, That, at the time libelled, a great number of persons, amounting to several hundreds, being unlawfully, riotously, and tumultuously assembled, to the disturbance of the public peace, did repair to the house of Mylnfield in the county of Perth, belonging to the pursuer, and having forcibly entered the said house, did unlawfully and with force, demolish and pull down part of the said house; and find it averred by the pursuer, and ascertained by the report of tradesmen, and not objected to by the defenders, that the pursuer did there-