

1750. *February 22.*ELIZABETH NEILSON and FARQUHAR her Husband *against* DONALD.

No 300.

THE Dean of Guild has no more jurisdiction than other inferior judges, to judge in a competition of heritable rights, but only in possessory questions; and even in these, where the possession has been very long, declarator of property is the only competent process.

*Fol. Dic. v. 3. p. 355. Kilkerran, (JURISDICTION.) No 2. p. 305.*

1740. *November 16.*GIBSON and Others *against* TULLY, Factor for the Heirs and Widow of Fleming.

No 301.

The dean of guild may, on the application of the debtor, order a creditor in possession to repair the subject.

WHERE a creditor is in possession, and allows the subject to go into disrepair, the debtor, who is proprietor, may, and commonly does apply for an order upon him to repair. And such order having been given by the Dean of Guild in this case, with the usual certification, 'That upon the creditor's not complying with the order, the complainer should have liberty to make the repairs, and the expenses should be a preferable burden on the subject;' the creditor in possession complied in part, but did not the whole, on pretence that the insufficiency of the part not repaired had been occasioned by the petitioner's neglect to repair a part of the tenement possessed by herself; whereupon the petitioner, in consequence of the order, employed tradesmen to finish the reparations, which, on a second visit, was approved as usual.

The tradesmen now pursue the creditor, who was ordered by the Dean of Guild to repair, as said is, for payment of their accounts; and the defence being as aforesaid, that the repairs he had omitted to make had become necessary through the petitioner's own neglect; the LORDS, without determining the dispute in point of fact, to whose neglect the disrepair was owing, were of opinion, that whatever the defender might have had to object to the Dean of Guild's order, it was now too late, after the order was executed; and therefore repelled the defence; but found that the tradesmen were, upon payment, obliged to assign.

*Fol. Dic. v. 3. p. 355. Kilkerran, (JURISDICTION.) No 3. p. 306.*

1752. *November.*MAGISTRATES of Stirling *against* SHERIFF-DEPUTE of Stirlingshire.

No 302.

In questions of neighbourhood within a

BY a charter of Charles I. in favour of the burgh of Stirling, confirming their former privileges, the burgh is erected into a sheriffship within itself, with

all the powers thereto belonging, to be executed as fully and freely as in the burgh of Edinburgh. Among their other privileges, the Dean of Guild and his council were in the constant and uninterrupted use, as in Edinburgh and other royal burghs, of determining all questions of neighbourhood within burgh; that is, all questions betwixt the proprietors of conterminous tenements; such as ascertaining the marches, regulating the form of buildings, adjusting servitudes, &c.

Some disputes having arisen betwixt two conterminous heritors, one of them brought a process before the Sheriff court, and obtained a sentence in his favours. This being reckoned an encroachment upon the Dean of Guild Court, the Magistrates of Stirling brought a declarator before the Court of Session, concluding, that in all questions of neighbourhood within burgh, the Dean of Guild Court has an exclusive jurisdiction at the first instance.

In support of the declarator, the following argument was urged: That the Magistrates in every royal burgh are the guardians of the police of the burgh, not only so far as regards the inhabitants, but also with regard to the public and private buildings, streets, &c. That the determination of all questions of neighbourhood is inseparably connected with the police of the town: That the Dean of Guild and his council are specially trusted with the last mentioned branch of the public police, as well as with the jurisdiction which is connected with it; and, therefore, that it would be no less inconvenient to trust a stranger with the jurisdiction, than to trust him with the guardianship of this branch of the public police.

“THE LORDS accordingly pronounced in favours of the pursuers; and it had no small weight that this exclusive jurisdiction appeared to be the common opinion of the nation, vouched from this circumstance, That hitherto no action of neighbourhood had ever been brought before the Sheriff.”

*Fol. Dic. v. 3. p. 356. Sel. Dec. No 25. p. 28.*

\* \* \* This case is reported in the Faculty Collection :

1752. December 14.—A COMPLAINT was brought before the Sheriff-depute of Stirlingshire, by Doctor Walter Stirling, proprietor of a tenement within the burgh of Stirling, against John Finlayson, for an encroachment committed by him, by raising the side-wall of his house, whereby the easing-drop of Mr Stirling's house was prevented from falling as formerly, contrary to the servitude acquired by him.

The Sheriff sustained his own jurisdiction, and gave judgment upon the complaint; whereupon the private party obtained suspension of the Sheriff's decree; and at the same time the Magistrates, Dean of Guild, and council of the burgh, brought a declarator before the Lords, to have it found and declared, ‘ That, by virtue of their erection, the sole and only jurisdiction, in all questions con-

No 302.  
royal burgh,  
the dean of  
guild enjoys  
a jurisdiction  
exclusive of  
the sheriff.

No 302.

cerning the building of houses within the burgh, taking down and rebuilding thereof, servitudes thereon, and marches and boundaries of the same, belonged to them and their successors in office, exclusive of the Sheriff; and that the Sheriff had encroached upon their jurisdiction, by taking upon him to judge in a question of that nature, betwixt the before-mentioned parties.'

The Sheriff-depute and his substitute having been made parties in this process, it was argued in support of the declarator,

*First*, That the subjecting the lieges to a variety of jurisdictions in the first instance, is attended with many inconveniences; that by our most ancient law, the Magistrates of burghs royal had an exclusive jurisdiction in the first instance, over their own inhabitants, Leg. Burg. cap. 6. 7. and 61, and although subsequent custom has made an alteration in this respect, in matters of ordinary jurisdiction, yet in all questions concerning the public policy, and the form and manner of building within burgh, the exclusive jurisdiction of the Dean of Guild, or other Magistrates of the burgh, remained in its full force, and which behoved of consequence to extend to all questions among heritors, dependent upon, or necessarily connected with, the policy and rule of building within the burgh.

*2dly*, The style of the brieve of lining clearly points out where the jurisdiction lies in questions of this nature; for, instead of being directed to the Sheriff, as all other brieves are, it is directed 'Præposito et Balivis burgi;' and appoints 'quatenus per duodecim e melioribus et fidei dignioribus burgensibus dicti burgi, per quos rei veritas melius scire poterit, magno sacramento interveniente, juste, et secundum leges burgi limari, faciatis tenementum, &c.'

*3dly*, The act 184th Parl. 13. of James VI. confirming the Dean of Guild's jurisdiction, expressly refers to the regulations of the burgh of Edinburgh, as the rule for ascertaining the jurisdiction of this officer in all the burghs of Scotland; and by these regulations, § 3, it is provided, 'That the Dean of Guild and his council bear the hail burden, and decide in all questions of neighbourhood; and neighbours wark be stayed but by him.'

And, *lastly*, As the jurisdiction of the Dean of Guild, as officer of police within the burgh, is thus established, both by ancient custom and statute; so it must be much more convenient to the lieges, in questions of this nature, to resort to him and his council, for the immediate cognition and trial of such questions, than to await the judgment of the Sheriff, who may perhaps reside in a distant burgh of the country, and has neither council nor judgment to assist him in the trial of such cases; and as this attempt of the Sheriff to extend his jurisdiction is new and unprecedented, so it does not appear that there is any reason, either from law, or the conveniency of the subjects, for favouring such extension of his power.

*Answered* for the Sheriff; The *leges burgorum* never were acknowledged in this Court as any part of the law of Scotland. The passages referred to by the pursuer prove too much; for the Magistrates are thereby declared to have an

exclusive jurisdiction in all causes both civil and criminal arising within the burgh, which, it is believed, was never the law of Scotland. The Sheriff's power of judging in cases of this nature arises from his jurisdiction over the whole county; for, if he may judge in such questions arising within villages or burghs of barony and regality within his county, why not also in burghs royal? The pursuers, in this case, both by their erection and special grant of Sheriffship, may have a cumulative jurisdiction with the Sheriff; but neither of these was meant to exclude the jurisdiction of the Sheriff as Judge ordinary over the whole county.

As to the act 184th Parl. 13, of James VI, it has no relation to the case in hand; it only confirms the power and jurisdiction of the Dean of Guild and his council, in all actions betwixt merchant and merchant, and betwixt merchant and mariner, conform to the usage of the town of Edinburgh; but this general reference can, with no propriety, be extended to other actions than those mentioned in the statute.

*Lastly*, The argument from the address and stile of the brief of Iyning, is of no weight. Where such brief is directed to Magistrates of burghs, the Sheriff can have no authority to execute the brief; but if such questions are pursued in the form of an ordinary action, and not by brief, there is no reason why the Sheriff may not judge in these as well as in any other questions that arise within his Sheriffdom. A parallel case occurs in disputed marches of lands; if a brief of perambulation is raised for setting the marches, the Sheriff alone can execute the brief; but, if such questions are brought to trial by the ordinary form of process, the Sheriff cannot, from the style and address of the brief of perambulation, pretend to an exclusive jurisdiction in such actions; and this Court every day sustains such actions, and determines therein in the first instance, notwithstanding of the known style and exclusive power of the Sheriff in the execution of the brief of perambulation.

Some of the Lords doubted how far the Sheriff-depute was a proper party for sustaining this declarator, without calling the Officers of State for his Majesty's interests. But others were of opinion, that, though the action could not be the foundation of a *res judicata* against other Sheriffs, or even against the Sheriff of Stirling, and his successors, in other questions, the declarator was still competent as to the particular action libelled.

"THE LORDS found, that the Sheriff did wrong in taking upon him to judge in the question betwixt Walter Stirling and John Finlayson mentioned in the libel; and found, that the pursuers have the only power of judging in that and all other questions of that sort within burgh."

Reporter, *Lord Elchies.*

Act. *P. Halden & J. Ersknie.*

Alt. *R. Bruce, T. Milleer, & A. Pringle.*

Clerk, *Justice.*

*M.*

*Fac. Col. No 45. p. 65.*