

tenants were embezzling and disposing of their goods so sequestrated; therefore, praying "a warrant to the clerk and officer of Court, to roup the effects sequestrated, for payment of the arrears of rent due at Martinmas last, and expenses; and to continue the sequestration on the over stock for security of the next half year's rent, from Martinmas to Whitsunday, now current."

Upon presenting this petition, the Sheriff, at his house of Elvingston, immediately granted warrant to the clerk of Court to roup the stock and crop, in terms of the prayer of the petition, and to report his procedure; and, further, ordained intimation of the roup to be made at the market of Haddington, on the market day, and at the doors of the kirks of Haddington, Gifford, Salton, and Bolton the Sunday preceding.

This deliverance being signed on Thursday,—on Monday after, the procurator for Mr Boswell reported to the Sheriff, that the next day, the 19th, being Tuesday, was fixed for the roup, and that intimation had been made, as ordered, except that no intimation was made at the kirks of Gifford and Bolton, there being no divine service there. Upon this minute the Sheriff granted warrant for the roup on the 19th, and it proceeded accordingly.

The Robertsons brought an action of damages for these proceedings: they called Mr Boswell, Mr Gray, the Sheriff, and officers of Court. Gray having died, they proceeded against the others.

They insisted, in the *first* place, That a warrant to sequestrate, granted *de plano*, was wrong; that the petition ought to have been intimated, and the warrant given *causa cognita*. The Lords laid no weight upon this, practice being different. They insisted, *secundo*, That the sequestration ought only to have been for the current rent, not for arrears where the hypothec was elapsed; see 4 *New Coll.*, p. 215. The Lords thought so too; at the same time it was alleged, that the practice was to give the warrant even for arrears, because that the hypothec upon corn was perpetual, and even upon cattle lasted three months after the term of payment. They insisted, *tertio*, That the warrant for roup ought to have been granted in a court, whereas it was granted by the Sheriff at his own house of Elvington. The Lords laid no weight upon this; but they thought the warrant for rousing ought to have been intimated to the party, which it never was, neither did they know any thing of the matter until all was sold: they thought the roup too soon after the intimation at the church doors, especially as Gifford and Bolton, the two nearest churches, were omitted; so that, upon the whole, though they assoilyied the Sheriff and officers of court, they found Mr Boswell liable in damages and expenses; 17th February 1777.

[It appeared that things sold at an under value.]

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1777. July 10. JOHNSTON, SYME, and SCOTT *against* GEORGE WARDEN.

"THE expense of repairing houses within the burgh, when it is authorised by warrant of the Dean of Guild, is secured by an hypothec on the house repaired, *ne urbs ruinis deformetur*; but he who repairs without such warrant, and relies on the faith of his employer, has no security on the subject itself." So says Mr Erskine, p. 425, § 34; and he cites Home, No. 3, and 11 *New Coll.*, No. 86.

The latest decision upon the point, is 21st June 1768, *Mack* against *Drummond*, not collected.

But then, it is carefully to be adverted to, that there is a difference betwixt a jedge and warrant granted by the Dean of Guild approving of a plan, and allowing heritors to build agreeably thereto : this species of jedge and warrant is necessary within burgh, in every case ; but this gives no preference to the workmen employed. It leaves every person concerned to employ what workmen he chooses, and the workmen follow the faith of their employer, and are not entitled to any preference for payment of their work. The decree of the Dean of Guild, which entitles workmen to a preference, is of a quite different nature, and in express terms declares, that the person obtaining the warrant and executing the repairs shall have a security or right of possessing the subject, until he is fully reimbursed ; and this is the hypothec mentioned by Mr Erskine, and established by the above decisions. But where a proprietor sets about repairing or rebuilding a tenement, although he must, in common course, apply for a warrant from the Dean of Guild, approving his plan, and granting license to build, yet there is no tacit hypothec established by this in favour of the tradesmen, by whom the work is performed. These last have nothing to do with the Dean of Guild's warrant, but follow the faith of their employers.

In consequence of all this, the Lords, 10th July 1777, found, that, where an heritor in Edinburgh obtains from the Dean of Guild a general jedge and warrant for rebuilding or repairing his tenement, and employs workmen who do not, till some time after, get themselves declared preferable for the repairs ;— an heritable debt, though contracted after the general warrant, and even after completing the work, but before the special decree of preference, is to be preferred to the workmen. And they preferred the creditors in such debt accordingly ; and found that the creditor, by the jedge and warrant, could not compete with him.

In this decision the Lords avoided determining as to the effect of the jedge and warrant, and decret of preference by the Dean of Guild, if the heritable bond had not been in the field : they only found, that it could not compete with the heritable bond in the circumstances above mentioned.

See further, Act 1696, another point in this case.

But even as to the general point, of the Dean of Guild's giving a tradesman any hypothec or preference even for repairs, preferable to an after creditor contracting on the faith of the records, some of the Lords, particularly Lord Covington, entertained great difficulty ; and signified so much, not only in the preceding case, but in a petition of Alexander Laing, mason, for a warrant on the sequestrated estate of William Taylor, advised on report by Lord Westhall, 6th March 1779, although the decision went upon another point : so the above was mentioned only incidentally.