

No 45. avail the journeymen, who wrought upon the faith of Maclelan, without relying on the subject.

THE LORDS preferred Lowrie to the journeymen.

C. Home, No 3. p. 11.

1758. *January 13.*

JAMES DONALDSON *against* JOHN GRANT, and OTHERS, Creditors of ALEXANDER REID.

No 46.
Preference given to a creditor who built or repaired a house, in virtue of a jedge and warrant.

UPON the 2d of February 1726, Donaldson's father applied to the Dean of Guild court of Edinburgh, setting forth, 'That he had right to part of a tenement of houses on the west of Liberton's wynd head, which had received damage by the burning of certain houses in the neighbourhood; that it was necessary to have jedge and warrant for rebuilding the tenement; and that the Representatives of Alexander Reid, and certain other persons, should be discerned to concur in the building.' After several steps of proceeding before the Dean of Guild, a judgment was pronounced, 7th June 1727, finding, 'that jedge and warrant ought to be granted for taking down and re-building, &c.; and therefore granting jedge and warrant accordingly.'

In consequence of this Donaldson's father rebuilt, not only his own part of the house, but also laid out L. 40 : 2 : 7d. in rebuilding and repairing a shop which belonged to the Representatives of Reid.

The Creditors of Reid having adjudged this subject, brought it to sale.— James Donaldson appeared, and claimed a preference for the L. 40 : 2 : 7d. which his father had bestowed upon the building.

Objected by the Creditors, By the law of Scotland there is no hypothec or preference to persons who lay out their money in building or repairing houses, otherwise purchasers and creditors would be insecure. The creditors in this case may have received a consequential benefit by the expense laid out; but is not sufficient to bind them, as Donaldson must have laid it out upon the faith of being repaid by Alexander Reid's heirs; and this point was determined 4th December 1735, James Burns *contra* Creditors of Maclelan, No 45. p. 6240.; and 5th February 1680, Rae *contra* Finlayson, *voce* PERSONAL and REAL. The creditors also *observed*, that the proceedings in obtaining the jedge and warrant had not been strictly regular.

Answered, Though no hypothec is allowed where a person repairs or rebuilds the house of another, without authority from the Dean of Guild, which was the case decided 4th December 1735, James Burns; yet it has been established by practice, that those who lay out money in consequence of a jedge and warrant, have a preference to all other creditors. Neither can this be attended with any danger to purchasers; because, by a search of the records in the Dean

of Guild court, they can always discover every debt of this kind. It may be true, that the jedge and warrant in this case was irregular in some minute particulars of form ; but as to every thing essential, it was unexceptionable.

No 46.

THE LORDS found, ' That the whole tenement, whereof the shop in question is a part, being built by the pursuer's father in consequence of a jedge and warrant from the Dean of Guild, the pursuer is a preferable creditor upon the said shop, for the whole expense laid out, to all the creditors of Reid, whether prior or posterior.'

For the Creditors, *Ferguson.*Reporter, *Lord Woodhall.**W. J.**Fol. Dic. v. 3. p. 296. Fac. Col. No 86. p. 150.*

 S E C T. VI.
Hypothec on *invecta et illota.*

1630. December 7.

DICK against LANDS.

No 47.

If a messenger come to poind the gear of one that dwells within burgh, the landlord may stop the poinding, if the tenant be owing to him a year's mail of the said tenement, until he be satisfied thereof, but may not stop for any more terras than one year's.

Fol. Dic. v. 1. p. 419. Auchinleck, MS. p. 160.

*** Durie reports the same case :

LANDS pursuing Dick for deforcement, in staying an officer to poind upon a bond registrate in the books of the Canongate, and conform to the act and warrant directed by the magistrates thereon to the officer, to make open doors; the defender *alleged*, that this bond registrate in the books of the Canongate, and the foresaid act to make open doors, could not be a warrant to bring the party under so dangerous an action of deforcement, except that, before that act to make open doors, there had been first a precept of poinding directed upon the sentence, and that precept had been executed by the officer, and reported again to the Magistrates, shewing, that he could find no goods strenziable, that thereafter that precept to make open doors, might have been directed ; which not being done, that decret of registration, and the act thereon, to make open doors, could not be a warrant, whereon the officer