

# APPENDIX.

## PART I.

### JURISDICTION.

1776. *March 9.*  
JOHN FERGUSON and Others, Burgesses of Dunbar, against ROBERT FALL,  
Merchant there.

By the charter of the Burgh of Dunbar, flowing from King James 6th, and dated 23d October 1618, there are *inter alia* disposed "all rights, privileges, and liberties of all and whatsoever ways, roads, and passages leading to the said burgh, or turning therefrom to whatever parts of our kingdom."

In 1773, the magistrates passed an act of council, accepting of a proposal by Mr. Fall to repair a street called Fisher-gate, to their satisfaction, upon condition of being allowed to take into his own pleasure-ground some ground which had been used as a road, called Winterfield-road or Backraw, but which was represented as not at all necessary for that purpose. Some of the burgesses presented a bill of suspension, and obtained a sist. Mr. Fall then presented a petition to the Justices of Peace, requesting a visitation of the premises. The justices appointed a Committee for that purpose, who reported "that they had perambulated or walked over both the roads mentioned in the petition; that the road desired to be shut up is 23 yards or ells shorter than the other road. There are two fisher's houses which lie on the south side of the road desired to be shut up, by shutting up of which, the entry to the two fisher's houses will be 20 yards further by coming by the road proposed by the petitioner. The petitioner offered to the committee to make a good cart road from the entry of the said fisher's houses to the road proposed, upon his own expence. The committee having considered the said road desired to be shut up, are all unanimous in opinion, except Mr. Hamilton, that the shutting it up will be attended with no inconveniency either to the town or the neighbouring heritors. The Committee also find, upon visiting the said road desired to be shut up, that when it comes to the west end of the petitioner's property, it divides into two branch-

No. 1.

The magistrates of a burgh were found entitled to shut up a road within the burgh.

See No. 21.  
p. 13181.

No. 1. “ es, one of which goes by the back of his dwelling-house, and separates it from his garden and inclosures; the other branch comes by the south of his house. These two branches unite again, and become one road at the east end of the petitioner’s property, terminating at the harbour of Dunbar. Mr. Hamilton gives as his reason for differing from the rest of the Committee, that the more roads there are to a harbour or sea-port, the better, and that he considers the road desired to be shut up to be the shortest and easiest to the harbour of Dunbar.”

After obtaining this report, Mr. Fall insisted for discussion of the suspension of the burgesses. It was heard before Lord Gardenstone (2d March 1775). His Lordship pronounced this interlocutor: “ Having considered the above debate, writs produced, and whole process, and particularly the report of the Committee of the Justices of Peace, finds the letters orderly proceeded, and decerns.”

Argument for the burgesses, in a petition to the court,

The road or street in question has been from time immemorial used as a public highway or street. An attempt is made to shut it up, and make the lieges go 23 yards about. This is contrary to law, as was distinctly ascertained, in the case of Turner against Duke of Roxburgh, No. 322. p. 7605. Lord Kilkerran states the ground of that decision to have been as follows: “ It was thought immaterial to make a strict inquiry, whether one of the roads might not answer the purpose of both; neither was it thought a proper consideration, whether it might not be expedient that the Justices of Peace should have power, if they should see cause, to make one high-way serve in place of two; because if they had no such powers, as the law now stands, the Legislature only could enlarge them: That they could suppress bye-roads, which travellers were apt to take, was admitted, as by that nothing is taken from them but what they had no right to have.

It was never before imagined that a Town Council could shut up a public street. In the case of Miller against Dalrymple, 3d November 1740, No. 7. p. 13527, it was found, “ that the public streets of a burgh belong to the Crown, and that the Magistrates and Council have no power to appropriate any part thereof.” The particulars of this case are not mentioned by Lord Kilkerran the reporter,—but from the printed papers it appears, that the Magistrates of North Berwick had feued to one Simpson, a part of the High Street for the purpose of erecting a building for distilling. The interlocutor of the Inner-House was, “ that the Magistrates could not warrantably authorise a building upon this area, which appears to be a *via publica* in the Town, therefore suspend the letters and decern.”

The decision in the case of the Magistrates of Montrose against Scot, No. 16. p. 13175.

Argument for Mr. Fall.

No. 1.

After the proposed alteration, the Winterfield road will remain in general as it is, and ever has been, viz. *one* and only *one* communication between Belhaven and the harbour; and all that is proposed is, for a very insignificant space, (less than two gun shots,) where it absurdly branches out into two narrow dirty alleys, to reduce these two into one good new paved road of a proper width; or, in other words, to continue the Winterfield road uniformly from the out-setting forward to the harbour, as it is already at the beginning and the end, viz. one commodious road of 21 feet breadth, instead of being composed, for a space, of two dirty branches, both in disrepair and almost impassible, and in many places the one not exceeding 12, the other 17 feet in breadth.

The case of Turner has no resemblance to the present question. There a *high way was suppressed*. Here no alteration is proposed, except in regard to a dirty narrow lane in the suburbs of a burgh, only 17 feet broad, not 20 feet, which is the narrowest characteristic breadth of a high way.

The case of Miller against Swinton and the Magistrates of North Berwick is equally inapplicable. There the Magistrates had feued a part of the High Street, 53 feet in length and  $10\frac{1}{2}$  in breadth, for a distillery. This was justly complained of, not only as being *ultra vires*, but as a nuisance. In the present case, the Magistrates of Dunbar have authorised a transaction highly beneficial to the community.

In the case of Scot against Magistrates of Montrose, an attempt was made to erect a building not only upon a public street of the town, but in such a manner as to come within nine feet of the complainer's windows, so as to darken them. Nothing resembling this is attempted in the present instance.

The following was the interlocutor of the Court: "Find that the Magistrates of Dunbar, as administrators for the burgh of Dunbar, had power, for the benefit of the burgh, to shut up the Backraw, the road in question, therefore adhere to the Lord Ordinary's interlocutor, finding the letters orderly proceeded. Find the suspenders conjunctly and severally liable in expenses, &c. but find that the charger is bound to widen and repair the road to the south of his house as mentioned in the minute, before he shall be at liberty to shut up the Backraw, and decern accordingly."

A second petition for the burgesses was refused without answers.

Lord Ordinary, Gardenston.

For Fall, R. Sinclair.

For the Burgesses, J. M'Laurin.

W. M. M.

---

1776. June 14.—JOHN BEUGO and JAMES BRYCE, Chargers, against DAVID M'CLEIRY, Suspenders.

THE suspender David M'Cleiry was a dealer in cow hides and calf skins. In July 1774, he informed the chargers that he had 200 dozen of dry calf

No. 2.

Whether a Judge-Admiral-Depute