by any gratuitous deed, and he is entitled to reduce and set aside all such as are done to his prejudice.

Judgment, 10th Feb. 1744.

After hearing counsel, "it is ordered and adjudged, &c. that the said petition and appeal be, "and the same is hereby dismissed, and that the "several interlocutors complained of be, and the "same are hereby affirmed."

For Appellant, *Wm. Noel, C. Erskine.*
For Respondents, *Ro. Craigie, W. Murray.*

COLONEL STRATTON, - - *Appellant;*
The MAGISTRATES of MONTROSE, *Respondents.*

19 *March*, 1744.

PUBLIC POLICE.—ACT I. GEO. I. c. 5.—PROCESS.— Found that, in an action upon the statute, it is not necessary to summon the whole inhabitants, but only the magistrates.

Found that action upon the statute is only competent where a building has been "demolished, or begun to be demolished," by a mob, with the intention of demolishing it, but not where injury has been done to a house in the prosecution of a different object.

Found by the Court of Session, that "no action lies on the statute for damage arising from the carrying off grain, or other "goods, out of any house or outhouse, but only for the damage "done by pulling down such house or outhouse." Reversed in the House of Lords.*

[Elchies *voce* Public Police, No. 5. Clk. Home, No. 224. Fol. Dict. IV. 197. Mor. Dict. 13158.]

No. 72.

IN the year 1741, a mob in the town of Montrose having broken into some granaries belonging to

* This reversal is not noticed in the Reports.

1744.
STRATTON v. MAGISTRATES OF MONTROSE.

Colonel Stratton, and otherwise injured the buildings, and having taken a quantity of meal therefrom, he brought an action on the act of the 1st of Geo. I. wherein he called the magistrates and town-council, as representing the community, and concluded against them for damages. The words of the act are, "that, if any persons to the number of "twelve or more, being unlawfully, riotously, and "tumultuously assembled together, to the disturbance of the public peace, at any time after the "last of July 1715, and being required and commanded by one or more Justice, or Justices of "the Peace, or by the Sheriff, or Under-Sheriff of "the county, or by the mayor or bailiffs, or other "head officers, or Justices of the Peace of the city, "where such assembly shall be, by proclamation "to be made in his Majesty's name, in manner "therein directed, to disperse themselves, and "peaceably to depart to their own habitations, or "their lawful business, shall, to the number of "twelve, or more, (notwithstanding such proclamation made,) unlawfully, riotously, and tumultuously remain, and continue together for the "space of one hour after such command or request, made by proclamation; and if persons are "so unlawfully, riotously, and tumultuously assembled, and shall unlawfully, and with force, "demolish, pull down, or begin to demolish and "pull down any church, or chapel, or any dwelling-"house, barn, stable, or other outhouses; then "and in such cases, it is provided and enacted, "(*inter alia*,) that the county, stewartry, city, or "burgh, (respectively within Scotland) where such "disorders happen, and such damages are done, shall "be held liable to yield damages to the person or

"persons injured, or damnified by such demolish-
"ing and pulling down, wholly or in part, and
"which damage may be recovered by summary
"action, at the instance of the party aggrieved,
"against the county, stewartry, city, or burgh re-
"spectively," &c.

There was also a separate conclusion against the magistrates, as being accessory to the riot, or at least having neglected to take proper measures to prevent it.

In defence it was objected, *first*, that no action was, by the statute, competent against the magistrates, as representing the community, and that it ought to have been brought against the burgh itself, *i. e.* the inhabitants thereof, as was the practice in England; and, *secondly*, that no action lay for any damage sustained by the abstraction of the grain—the damage awarded by the act relating only to such as was sustained by houses being demolished, or begun to be demolished.

A conjunct proof was allowed, after which the Court (28 Jan. 1743) found, "that, by the act
"libelled on, it is the town, or county, within which
"such damage as falls under the act is done, that
"is liable in reparation of the damage, and there-
"fore sustained the objection made to the pursu-
"er's libel, which had not concluded against the
"town of Montrose, but against the magistrates
"and council, as representing the town; and found
"that no action lies upon the statute for damage
"arising from carrying off grain, or other goods,
"out of any house, or outhouses, but only for the
"damage done by pulling down such house, or
"outhouse, in whole or in part, and therefore found

1744.

STRATTON v. MAGISTRATES OF MONTROSE.

"this action, in so far brought on this statute, in-
"competent."

But upon advising a reclaiming petition, with answers, their Lordships (24 Feb. 1743) "repel "the objection against the libel, and find that the "burgh is fitly called, and concluded against, by "calling and concluding against the magistrates "and town-council, as representing the said burgh; "and adhere to their former interlocutor, finding "that no action lies upon the foresaid act for da-"mages arising from carrying off grain, or other "goods out of any house, or outhouses, but only "for the damage done by pulling down such house, "or outhouse, in whole or in part; but find that "there is no proof adduced of the extent of any "damage done to the girnel-house in which the "pursuer's meal was lying," &c.

Entered 21st March, 1743.

The appeal was brought from these and other interlocutors in the cause.

Pleaded for the Appellant:—By the statute, the county, burgh, &c. are rendered liable to the party injured for the whole damage sustained by such demolishing, or beginning to demolish any house, or outhouse; and it seems strange to confine the words of the act to the bare pulling down the stones of the building, which may amount to a trifle, and to give no damage for gutting the house, or carrying away the grain, which may be of much greater value. Such could never have been the intention of the act. But, in point of fact, the granary was in part demolished, and the door broken open, to get at the meal, which must imply some damage, and that alone entitled the appellant to a judgment in his favour.

1744.

STRATTON v. MAGISTRATES OF MONTROSE.

Pleaded for the Respondents.—The appellant cannot recover any thing upon his action as founded upon the statute; for by this act no relief is given for goods taken out of any house, &c. and the appellant has proved no injury by the demolishing of any building.

Judgment, 19th March, 1744.

After hearing counsel, "it is ordered and adjudged, &c. that so much of the interlocutor of "the 28th Jan. 1743, whereby the Lords of Session found, 'that no action lay upon the act of 'Parliament, &c. for damage arising from carrying off grain, or other goods, out of any house or 'outhouse, but only for the damage done by the 'pulling down such house or outhouse, in whole 'or in part,' be, and the same is hereby reversed; "and that there be inserted instead thereof these "words, (*videlicet*): 'That upon the proofs in this 'cause, it doth not appear that the appellant's 'girnel-house was begun to be demolished, or 'pulled down, within the intent and meaning of 'the said act of Parliament;' and it is hereby "further ordered, and adjudged, that so much of "the interlocutor of the 24th February, whereby "the Lords of Session adhered to their former "interlocutor, finding, 'that no action lies upon 'the foresaid act for damages arising from carrying off grain, or other goods, out of any house 'or outhouse, but only for the damage done by 'pulling down such house or outhouse, in whole 'or in part;' but found that there was no proof "adduced of the extent of any damage done to "the girnel-house in which the appellant's meal "was lying, be, and the same is hereby reversed; "and it is also ordered and adjudged, that so "much of the several interlocutors as relates to the

1744.
WATSON v. GLASS, &c.

"costs and expenses of the said appellant be, and "the same is hereby reversed, and that so much of "the said several interlocutors as is not hereby re-"versed, or altered, be, and the same is hereby af-"firmed."

For Appellant, *W. Murray, Al. Lockhart.*
For Respondents, *R. Craigie, C. Erskine.*

THOMAS WATSON, Trustee for the HEIR of HAMILTON of Redhouse and CREDITORS, - - *Appellant;*
THOMAS GLASS, *et alii*, - - *Respondents.*

5 *December*, 1744.

TAILZIE.—PROVISION TO HEIRS AND CHILDREN.—CLAUSE.—Under a clause in an entail binding the heirs male of tailzie and provision, to pay a certain sum "to the daughters and heirs "female" of the entailer,—the entailer's daughter was found entitled to the provision, although not his heir, a son of his having succeeded to the estate.
COSTS.—£50 given to Respondents.

[Elchies *voce* Provision to Heirs, No. 7; C. Home, No. 237; Fol. Dict. III. 124; Mor. Dict. 2306.]

No. 73. HAMILTON of Redhouse, by his contract of marriage, was bound to take the titles of his estate to himself and his spouse in liferent, and to the heirs of the marriage in fee. He afterwards executed an entail of his estate in favour of James Hamilton, his son, and the heirs male of his body, whom failing, the other heirs male of his own body, (with