

B U T C H E R S.

1707. December 26.

OGILVIE against MELLIS.

MR JOHN OGILVIE, clerk to the regality of Couper in Angus, takes out a decret against Andrew Mellis, for the penalty of the 11th act of Parliament 1686, for winter herding; libelling that 50 cows of his broke in upon his inclosures, and so he must have half a merk for each of them *toties quoties*. The decret being turned into a libel, he *alleged imo*, the pursuer had no inclosure, but a low feal dyke, that could keep out no beast; neither was there a stick of planting or hedging therein: *zdo*, He was no ways in the terms of that act, which was in favours of planting, and to keep out our neighbour's goods he had for pasturing or labouring the ground, but not against drovers, who use to buy an hundred head of cattle in the Highlands, and bring them down to the lowland markets to sell; and if they, in their transient passage, do any skaith by start and o'er loup, the owners are indeed liable to make up the damage; but it was never designed they should incur the penalty of the fore-said act, seeing that the trade of droving is very necessary, and brings in money from England, and ought not to be discouraged; and it is impossible but great droves in the passage will do some skaith; but, if his ground had been fencible, they could not have found access, and they are most willing to pay the skaith.

Answered, The act of Parliament makes no distinction whether they be in droves, or constantly in our neighbourhood, and the one may be as oppressive as the other. The LORDS were loth to give any encouragement to break so good and profitable a law, though it had taken little effect in the country, and in some grass rooms was impossible to be observed, where there was great store of cattle; therefore, before answer, they allowed a trial, what sort of inclosures the pursuer's were, and the nature of the damage done, before they could determine whether this case fell under the act of winter herding; especially as there appeared more design of catching advantage here, than any real loss and prejudice done him.

No 1.

Import of the act of Parliament relative to winter herding.

The act of Parliament prohibiting butchers from possessing more than an acre of land not tilled and sown yearly with corn, under a penalty and forfeiture of the beasts pastured thereon, extends only to tacksmen-graziers, and does not hinder butchers from using their own land as pasture.

No 1.

February 3, 1708.—Lord Prestonhall reported Mellises *against* Mr John Ogilvie, Bailie of the Regality of Couper, mentioned 26th December 1707. Mellises being butchers to their calling, and having right to some wadset lands, fattened their beasts thereon, and are pursued by Bailie Ogilvie on the penal statute, act 7th 1703, discharging fleshers to be graziers, and fined in L. 100 Scots. Of this decret a reduction was raised, on this reason, that the act being penal, and restricting men in the free use of their property, ought to be strictly interpreted, and only extends to butchers farming of grass parks, by which they made themselves masters of the markets, by forestalling and monopolizing the beasts, that heritors could get no price for their cattle but what they pleased to give them; but can never exclude and incapacitate fleshers from buying land, and putting their beasts thereon. What if he were creditor to one who has a grass room, may he not adjudge it for his debt, as well as any other subject might? *Answered*, The act of Parliament was clear, whether we consult the words or their meaning; *id non tantum lege comprehenditur quod verbis legis continetur, sed quod in sensu ejus et anima latet*; and judges should not be discouraged for punishing delinquencies, the common complaint being, that they are too remiss and slack that way; by which, good laws lie as a dead letter, after they are made with much deliberation and providence; and if this good act be restricted to what butchers only possess by tack, its excellent design may be easily frustrated by purchasing a park; and so being both butcher and grazier at once; but if he will be a laird, then let him quit his trade, as a merchant may not be a tradesman, nor a mason a wright, &c. and the words of the act, that he shall not bruick nor possess any parks exceeding an acre, extend to buying and wadsetting as well as taking in assedation and tack for a space of years. *Replied*, It appears by the certification annexed, that the act meant no more but tacks; for it declared them all void and extinct after Whitsunday 1704. The LORDS by plurality, found the act did not extend to fleshers who acquired rights of property, whether redeemable or not, but only to lands taken by them in farm; for they considered a flesher might take many grass rooms for rent who was not able to buy or wadset them. (See Lord Fountainhall's observations on this decision in the case Wallace *against* Cunningham, *voce* COALIER.

Fol. Dic. v. 1. p. 120. Fountainhall, v. 2. p. 408. & 425.

.. Forbes reports the same case :

IN the action at the instance of Andrew and Donald Mellises against John Ogilvie, for reducing a decret pronounced by him against them as contraveners of the act 7th Parliament 1703, by keeping a wadset of several acres of land in grass for pasturing of cattle, though they be butchers; seeing the said statute discharges all such persons to take, bruick, or possess by themselves or others for their behoof, directly or indirectly, any lands exceeding an acre untilled and unsown with corns yearly, under the pain of L. 100 Scots *toties quoties*, besides

the forfeiture of the beasts grazed thereon, and the contraveners burghship in all burghs :

No 1.

THE LORDS sustained this reason of reduction, That the land on which the pursuers graze their cattle is their own property by a wadset right standing in their person : And the act of Parliament discharging butchers to be graziers, concerned only tacksmen graziers. Albeit it was alleged that the general words, bruick and possess, comprehended rights of property ; and the prohibition might be eluded if restricted to tacksmen, by butchers taking wadsets in place of tacks. And that there was no greater hardship in hindering a flesher from grazing on his own land to prevent his forestalling the market by fattened cattle at hand, to the discouragement of drovers from coming to serve the lieges at cheaper rates, than there is in the policy of burghs hindering a merchant to be a tradesman, or a tradesman to be a magistrate. But yet this decision seems to be founded in law and reason ; because, a penal statute ought to be strictly interpreted, and it were out of measure hard to debar butchers from the common benefit of securing their money, by taking heritable rights into their own possession, when perhaps tenants cannot be had, and the nature of the ground is only proper for grass. •

Forbes, p. 234.

* * * Country butchers resorting to the markets of Edinburgh with their fleashes, together with the skins, are free to sell their skins to the best advantage, and are not bound to sell at the price set on them by the skinners or the magistrates. And, if they get not their own price, they may carry them back, and neither the magistrates nor skinners are entitled to secure them. 8th July 1712, Country Butchers against Magistrates of Edinburgh ; Forbes, p. 611. See JURISDICTION.—PUBLIC POLICE.—PLANTING and INCLOSING.