

1752. July 7.

WALTER MILLER, Procurator-fiscal of the Burgh of Perth, *against* ALEXANDER CLUNIE, and Others.

## No 67.

The magistrates of a royal burgh, not erected into a barony, may not prohibit the importation of ale into the burgh. The erection of a royal burgh does not include the privileges of a barony.

IN 1748, by act of the town-council of Perth, the inhabitants were prohibited, under certain penalties, from importing any ale or beer brewed without the liberties of that burgh: Alexander Clunie and Company having been pursued before the magistrates, at the instance of the procurator-fiscal, for transgression of this act, the case was advocated by consent of parties.

*Pleaded* for Walter Miller procurator-fiscal, The town of Perth, by its charter of erection, and by subsequent grants from the Crown in its favour, is entitled to all the privileges of any royal burgh in Scotland: that its magistrates have not exceeded, in their act of council, the powers given them by law, is evident from the case of the magistrates of Musselburgh, decided not many years ago, where it was found that they were entitled to prohibit the importation of ale into the burgh: if such are the rights of a burgh of regality, *a fortiori* must they belong to a royal burgh, more especially to such an one as Perth, which has been always held particularly to enjoy the privileges of a barony; *vid. Skene ad leges burgorum, cap. 19.* and that every baron may not only regulate the brewing of ale within his barony, but also prohibit the importation of ale brewed without the limits of his barony, is a principle incontroverted in the law of Scotland.

*Answered* for Clunie and others, The argument used on the part of the magistrates proceeds upon a supposition manifestly erroneous, *viz.* that the erection of a royal burgh implies in it the right of a barony; whereas in truth these grants differ widely both in their nature and in their effects: the erection of a barony is a grant in favour of the baron himself, who is proprietor of the ground, and consequently entitled to all emoluments thence arising: of this nature is the privilege implied in the common clause in charters *cum brueriis*; which privilege is so much the consequence of property, that it will be carried, although not expressed, by a general grant of lands. The erection of a royal burgh, on the other hand, is not of the nature of a private grant of property; royal burghs are established for the general benefit of the nation: Both the estate and the freedom of the burgh remain *inter regalia*, and may not be alienated: the bailies are the King's bailies, and every individual is the King's vassal in his burghage tenements. The terms of the grants from the Crown to royal burghs must determine the measure of their rights: and nothing, besides what is essential to the constitution of a body corporate, is implied in them: Thus we find in the *Leges burgorum, cb. 19. Quod in burgo non debet audiri bloodwit, marchetæ, herexeld, nec aliquid de similibus*; on which Skene observes, *hujusmodi privilegia et immunitates pertinent ad barones, non ad burgenses, nisi jus baronum et vicecomitum habeant sibi concessum.* This shows that, in Skene's opinion, nei-

ther the right of barony nor that of sheriffship is implied in the erection of a royal burgh. It is confessed that the town of Perth has a right of sheriffship, in virtue of express charters to that effect; but that any of its charters contain a grant of barony, or of its privileges, is a groundless averment: As to the case of the town of Musselburgh, it is not in point; for that town is, by special charter, erected into a barony.

'THE LORDS found that the Magistrates of Perth had no power to make the act pursued on; and therefore assoilzied the defenders, and decerned.'

Reporter, *Kilkerran.*

Act. *J. Grant, J. Craigie, R. Craigie, et Advocatus.*

Alt. *Miller, Lockhart, Ferguson.*

Clerk, *Pringle.*

*Dalrymple.*

*Fol. Dic. v. 3. p. 107. Fac. Col. No 25. p. 44.*

\* \* \* Lord Kames reports the same case :

ALEXANDER CLUNIE, merchant in Perth, and others, having resolved to bestow a sum of money upon brewing and distilling, feued a piece of ground closs to the town, but not within its liberties; and built houses to a considerable extent. This was an advantageous situation, which gave them all the advantages of the town as a market, without being liable to its burdens. Being thus able to undersell the brewers of Perth, who were thirled to the town's mills, the magistrates, jealous of the interest of the town, made an act of the town-council December 1748, inhibiting and discharging the inhabitants of the burgh to import into the town any beer or ale brewed without the liberties, under the penalty of L. 5 Sterling for each transgression. Upon this act Alexander Clunie and his partners, who are inhabitants, being condemned by a sentence of the magistrates for importing ale into the town; the cause was advocated and reported to the Court. The magistrates, in name of their procurator-fiscal, used many arguments; but the only plausible one was, That the erection of a burgh royal includes all the rights of barony; that a baron can restrain the importation of ale into his barony, and that the magistrates of a royal burgh must have the same privilege. It was denied by the defenders that the erection of a royal burgh includes the privilege of a barony. The erection of a barony is a grant in favour of the baron; he, as proprietor, can exercise all acts of property, thirling his people to his own mill, to his own brewery, or to his own smithy; for a very obvious reason, that no man is entitled to take up a dwelling within the barony without his allowance; and if he submits to dwell within the barony, must submit to the conditions imposed by the baron. The erection of a royal burgh is not for the benefit of any particular person, but for the benefit of the inhabitants in general, or rather for the conveniency of the lieges in general, in promoting trade and manufactures. No man can be denied access to a royal burgh, either for selling or purchasing the necessaries and conveniencies of life; unless where there are exclusive privileges by parti-

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cular grants, which is not the case here ; for it is not pretended that the brewers are a corporation or have a seal of cause.

' THE LORDS found that the magistrates had no power to make the act.'

*Sel. Dec. No 13. p. 15.*

1752. July 8.

No 68.

Freemen and burgesses of royal burghs, dealing in salmon, may employ unfreemen in making their barrels within burgh.

The CORPORATION of COOPERS in Perth *against* KEIR and Company.

THE corporation of Coopers in Perth exhibited a complaint to the Magistrates of Perth ; wherein they narrated, that one Davidson, an unfreeman, had encroached on the privileges of their corporation, by making salmon-barrels within the burgh ; and concluded, that he should be prohibited from so doing in all time to come.

Keir and Company (who had employed Davidson as their servant) insisted that they, as freemen and burgesses, were entitled to deal in the salmon trade, and consequently might either import barrels ready made, or employ within the burgh whom they pleased in making them : ' The magistrates nevertheless sustained the complaint, and prohibited Davidson from working in the cooper work within the burgh and liberty thereof, under the penalty of L. 5 Sterling for each transgression.'

Of this sentence suspension was obtained, and the case reported.

*Pleaded* for the chargers : Unfreemen are neither authorised by law nor custom, to exercise within burghs that craft which is peculiar to any of the corporations therein established, although their employers be freemen and burgesses, and the work so made be intended for exportation. The exportation of salmon is a branch of trade by law appropriated to the freemen of royal burghs ; and the legislature intended also that the barrels, used in the package of salmon so to be exported, should be made only by the coopers freemen in royal burghs : Hence, when regulations, establishing the size and form of such barrels, were introduced, and the observance of these regulations was enforced by certain penalties, the execution of the law was committed to the magistrates of royal burghs. This appears from act 33. Parl. 1. sess. 1. Charles II. Now, if the making of salmon-barrels by unfreemen, be tolerated within a royal burgh, it will be impracticable for the magistrates, or for the visiters by them appointed, to enforce the observance of the regulations aforesaid.

*Pleaded* for the suspenders : That the chargers have the exclusive privilege of making salmon-barrels within the burgh for sale, is not disputed : The suspenders only contend, that they, as burgesses and guild-brethren, may carry on the fishing trade and export salmon : That, as a right to the *end* implies a right to the *means* also, they are entitled to import salmon-barrels from without the burgh, or to employ their own servants, although not freemen, in making them within burgh.