right and privilege; and the defenders could not have prescribed a right and freedom to brew, seeing they have not a title, there being no such clause mentioned in their charters, and prescription does not run against an express law; but the Baron may resume and make use of that power and privilege at any time that is allowed by the law, within his own barony; as also the prescription was interrupted by an act of the pursuer's author's Baron Court, in the year 1649, discharging any man from within the barony to brew without licence. No. 5.

The Lords found, That the defenders may brew or use any manufactory without licence of the pursuer, albeit they be not infeft *cum brueriis*; and found that the words *cum brueriis* were only *ex stilo*, and that the granting of the feu did imply the same, though not expressed, and therefore assoilzied the defenders.

Sir P. Home MS. v. 1. *No.* 19. *p.* 28.

1762. *February* 27.

WALTER ORROCK *against* MICHAEL BENNET, &c.

No. 6.
No regulation by a Baron with respect to brewing or vending ale within the barony, is binding on those who have feus or tacks of an earlier date than the regulation.

Mr. Wemyss, proprietor of the barony of Wemyss, having, by an act in his Baron-Court, bestowed upon Walter Orrock the exclusive privilege of brewing within this barony; and decreet having proceeded accordingly fining several private brewers; the matter was brought before the Court of Session, and thought of importance to admit a hearing in presence. It was chiefly insisted on for supporting the act of the Baron-Court, that there are certain subjects, such as mills, fortalices, dove-cotes, &c. which are never understood to be conveyed with land, unless mentioned in the disposition; and Craig, Lib. 2. Dieg. 8. § 25, was quoted to prove, that brewing and vending ale are of the same nature. The only exception is a disposition of a barony, which, being *nomen universitatis*, is understood to comprehend all these particulars.

It occurred to the Court at advising, that our law is altered as to this matter, and that there is a reason for the alteration. Fortalices originally were of great importance in a country that never was at rest from intestine commotions: Mills and dove-cotes being rare, made a considerable figure; and for that reason merely were not comprehended in a disposition to land unless expressed. But fortalices are no longer of use, and mills and dove-cotes have became extremely common, and, in our later practice, pass with the lands upon which they stand without necessity of an express grant.

The question then is, whether the old law still takes place with respect to the privilege of brewing. Craig, in the passage above cited, puts this privilege, and that of having a smith's shop, upon the same footing, observing, that as both are profitable, the Baron is never understood to communicate to a vassal the benefit of either unless expressed. At present this country is well supplied with brewers and smiths, and even oppressed with an over-proportion of the former.

No. 6. The benefit is reduced to a trifle, so as to make it of no benefit to the Baron to retain either to himself. For that reason, it is now established in practice, that any feuer may erect a smith's shop. And that he may also erect a brewery was determined as far back as the year 1681, 24th December, Nisbet of Dean, *supra*.

This point being established, what remains is to examine, whether the vassal must confine within his own feu the traffic of vending ale. Except those who are limited by express agreement, every one may provide themselves with liquor where they can find it. They may import wine, strong or small beer, porter; and why not buy from a feuer within the barony? And if they can buy from him, it appears a plain consequence, that he may offer it to them for sale. To deny this, must infer a privilege in the Baron which has no foundation in the feudal system, or in any principle, viz. a privilege to confine his people to buy their liquors from whom he pleases. And why not also their meat, their clothes, &c.? Suppose a Baron builds a mill after feuing out some of his lands, it is certain he cannot astrict these feuers to his mill; and as little can he astrict them to his brewery.

Monopolies of this sort are of all the most oppessive. With respect to ale in particular, no regulations can be invented to bar the brewer from imposing upon those who are astricted to his brewery the merest trash at an exorbitant price.

It was yielded, that a Baron or any proprietor may establish regulations within his own lands, which will be binding upon all new inhabitants, who, by chusing their residence there, must submit to these regulations. An act accordingly of the Baron-Court may be binding upon new comers, but upon none who had an established residence before it was made.

"Find that no regulations made by a Baron with relation to brewing or vending ale within the barony, are binding upon those who have acquired feus or tacks before the existence of such regulations: And, in respect the suspenders were feuers of the barony of Wemyss long before the act of the Baron-Court, granting to Walter Orrock the sole privilege of brewing ale in the barony; therefore, suspend the letters *simpliciter*, and decern."

Some of the Judges insisted to have the interlocutor more explicit, by mentioning that the inhabitants, whether of a barony or of any other lands, could not be abridged of their natural liberty but by their own consent, implied from their chusing to take up their residence in a place where such regulations are established. But for peace sake this interlocutor was submitted to as truly importing the same. For upon the same footing that anterior feuers and tacksmen are exempted, every other person must be equally exempted who had an established residence in the barony before the date of the regulations, not excepting colliers and salters.

Sel. Dec. No. 194. *p.* 257.