

1783. July 15. ALEXANDER FERGUSON and OTHERS *against* The MAGISTRATES of GLASGOW.

BURGH-ROYAL.

The Powers of Magistrates in Royal Burghs with regard to imposing new Duties or Customs.

[*Fac. Coll. IX. 436; Dict. 1999.*]

BRAXFIELD. It is a general practice for magistrates in royal burghs to levy small customs at markets. The grants on which such practice is founded are generally indefinite. It is said "that general words import nothing, but that they may be explained by usage." How can a possession be sanctified without a title? When the Crown grants fairs and markets, the meaning is, not that the representatives of burghs, or that heritors, shall have the power of allowing *vivres* to be sold, but that they should have a power of regulating fairs and markets, and of imposing small taxations for defraying the expenses attending such fairs and markets; and therefore I cannot agree to the proposition, that magistrates have no power to impose small duties on potatoes, because they have not been in possession of levying such duties. If they exact too much, the Court may interpose, and modify them to what is reasonable. If possession were necessary, I should think that the general practice of imposing duties on all sorts of *vivres*, authorises the magistrates to impose the like duties on what may be called *new* kinds of *vivres*. Suppose *yams* should be imported into Glasgow for sale, would they be exempted from duty, because a new species of importation? It is admitted that potatoes sold in the market must pay duty. I consider the whole royalty to be the market.

ESK GROVE. The inhabitants of Glasgow have here an interest separate from that of the community. When grants are made, in favour of individuals, of fairs and markets, a right is given to levy petty customs; but I cannot be of opinion that grants of this nature to a burgh authorise the magistrates to convert the whole town into a market place. It was found, in the cases of *Inverness* and *Aberdeen*, that all the trafficking burgesses must *concur* in laying on a taxation. The magistrates of Glasgow saw this difficulty, and therefore they proposed to have the aid of Parliament to enforce the taxation; but it seems that they got no encouragement to proceed on that plan. At the constitution of a burgh, the individuals who composed it agreed that such and such customs should be paid, and this will be implied from possession; but nothing of this nature occurs *here*, for the possession is traced to its source, and that is not very remote. If Lord Braxfield's doctrine be good, "that the whole town is a market," then every thing brought into every house may be taxed. The magistrates have more to say as to levying a tax on the potatoes brought to their market.

MONBODDO. If the magistrates have a right to impose a duty on potatoes, they may impose the like on every commodity. If this claim is well-founded,

it will be a tax severe beyond measure or example. The question is not about what is brought to the market, but what is sold in the streets, &c. No taxation can be imposed unless by authority of Parliament, by special grants, by general grant, as explained by possession, or by the united consent of the inhabitants.

HAILES. It is by connivance that persons are allowed to sell their goods in the streets of burghs, for streets belong to the public at large. But, while they are used as markets, I do not see why such customs as are levied at markets may not be levied in them. Thus, for example, in Edinburgh there is a market for horses, &c. in the street called the *Grassmarket*, and there seems no reason for holding that that street is anything else but a market-place, so far as horses, &c. are sold in it; and, if so, where is the hardship or impropriety in levying customs there, any more than there would be in levying them in any close or square particularly allotted by the magistrates for the purposes of a horse-market?

SWINTON. It is in the power of the magistrates to prevent public passages from being incommoded with potatoe-carts, and the like; but they cannot tax them. The tax is exorbitant. It is not forty years old. Originally it was 1-160th part, and sixpence to the crier; but, in the course of less than forty years, the duty has increased to five per cent. I cannot subscribe to the doctrine that magistrates have an inherent right of taxation. Liberty implies not only an exemption from oppression, but also an exemption from the *possibility* of oppression.

HENDERLAND. Had there been forty years' possession, I should have considered this as one of the ancient *telonia*. There appear to have been duties paid to the Crown before the institution of burghs, which duties were sometimes granted to the community at the erection, and sometimes reserved by the Crown. On this footing I would explain the original right of taxation granted to burghs.

GARDENSTON. The question is, Whether have the magistrates a right of exacting customs, independent of immemorial possession? I distinguish between *taxes* and *customs*. *Taxes* may be on things, persons, transactions: customs are duties levied on commodities brought in from the country. What is this duty on potatoes? Nothing but a substitution instead of a duty on another product of the earth. If potatoes are brought in for the sustenance of the people, the quantity of oatmeal brought in will be smaller. So here there is nothing but a change in the object of the tax, and no additional burden laid on the inhabitants, or addition made to the town's revenues.

STONEFIELD. Customs were introduced to protect the privileges of royal burghs. The territory of Glasgow is narrow, but that of Dumbarton extends for twenty miles. Magistrates may levy customs even without the aid of possession.

KENNET. (*In the chair.*) Here there is nothing but a *custom*, like that which is levied on other commodities. The case of *Inverness*, as also that of *Aberdeen*, related not to a custom but to a stent on individuals, which the magistrates could not impose by their own authority. This custom on potatoes is by analogy. Were maize or Indian corn to be imported, it ought to pay duty, just as wheat. The quantum exacted, if too high, may be modified. If potatoes had ever been brought into the market duty free, something might

have been said for the exemption ; but that is not the case, there has been still a use of levying.

JUSTICE-CLERK. If it shall be found that the magistrates have a right to levy duties at the markets, it will be entire to consider whether they have a right to compel the sellers to repair to the market.

On the 15th July 1783, "The Lords repelled the defences."

*Act.* R. Dundas. *Alt.* Ilay Campbell, &c.

*Diss.* Gardenston, Braxfield, Stonefield, Hailes, Kennet.

Hearing ; concluded cause.

1783. July 15. JAMES ROSE WATSON *against* ELIZABETH GORDON.

PAPIST—

May succeed to a Lease of Lands.

[*Faculty Collection, IX. 177 ; Dictionary, 9615.*]

HAILES. Should the legislature repeal the statute in question, I might consider myself at liberty to give my opinion on its nature and tendency. But, until that shall happen, I must consider it as the law of the land, and I must interpret it fairly ; always remembering, however, that it is a statute purely penal, and not to be extended beyond its express words. This statute is not without precedent ; for there are edicts of Louis XIV. of France, devised against his Protestant subjects, in terms nearly similar. There were weighty reasons in 1700 for enacting such a statute. The wild expedition to Darien had proved unsuccessful : the nation was disappointed and impoverished : and to this the distresses of famine were added. A nation, so circumstanced, looks round to discover the authors of its misery. There can be no doubt that King William and his ministers never approved of the Darien expedition, and that every thing was done by the English to prevent its success that could be decently done. This exasperated the people of Scotland, and it became necessary for King William's ministers to do something that might soothe and conciliate their minds. It appears, from Carstair's State Papers, that King William's ministers did, for this purpose, bring forward two bills, one for securing the Protestant religion, and the other for securing the liberty of the subject. Here we see the true cause, as well of the statute in question as of the statute anent wrongous imprisonment. Both of them were owing to the unfortunate Darien expedition. There is nothing in this statute which applies to *tacks*. In common language a *tack* is not called an estate. We say that such a one has left no *estate*, but has left to his heirs a lucrative *tack* ; and, if *that* is the language at present, much more must it have been at the beginning of the century, when tacks were not so profitable, or of so long endurance, as at present.