

pursuers contend, is one that the legislature has already provided redress of. It is that of forestalling markets; for the object of the defenders, is to buy up the best part of the commodity in question before the market be open for the pursuers; a proceeding contrary to law; *Leges Burgorum*, cap. 16. *et seq.*; act 21. Parl. 4. James V.; act 150. Parl. 12. James VI.

THE COURT considered themselves as empowered to decree such alterations in the state of this market as seemed suited to the circumstances of the case. They now adopted their former interlocutor, settling the hour of market, and prohibiting, without any exemption whatever, the buying of yarn, except in the market place. See JURISDICTION.—Court of Session.

Reporter, *Lord Westhall.* Act. *Henry Erskine.* Alt. *A. Abercromby.* Clerk, *Home Stewart.*
Fol. Dic. v. 3. p. 102. Fac. Col. No 102. p. 161.

1786. June 29.

ALEXANDER FERGUSSON, and Others, *against* The MAGISTRATES of GLASGOW.

THE charters from the Kings of Scotland, in favour of the magistrates and community of the town of Glasgow, contain a grant 'of the small customs of the ports, and of the bridge, and of the meal-market,' and of various other markets there specified; 'together with all other duties and customs of which they are or formerly were in possession, or which may happen to be imposed with consent of the council and community of the said burgh.'

An impost or custom had been immemorially levied on fish, oat-meal, and many sorts of vegetables sold within the town. But with regard to the article of potatoes, though the tacksmen of the markets had frequently exacted a trifling duty from the merchants, this was only a recent practice, and never universally submitted to.

In the year 1751, public markets had been erected by the magistrates. Afterwards, in 1781, they enacted, 'That for all potatoes brought into the town, and sold either in the public markets, or in the streets, or in shops, a duty of 2s. on each cart-load, and proportionally on smaller quantities, should be exigible by the collector of the town's revenue.'

Some of the inhabitants brought this regulation under challenge in an action of reduction; when it was

Pleaded for the magistrates: The administrators of royal burghs have an inherent power of levying, for the use of the community, certain small duties or customs on goods imported or sold within their jurisdiction. This is essential to the maintaining of a proper police. It has been exercised in every town in Scotland; and in Glasgow, it has been recognised by the Sovereign, to whom, by our ancient constitution, the prerogative of erecting corporations, with all

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Magistrates in royal burghs have power to impose new duties or customs, on articles brought to market, or sold in shops, or elsewhere; but the Court of Session will restrict them if too high.

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the necessary and attendant rights, has been understood to belong. Not only the power of exacting such duties as were known and established, but also that of imposing new and additional burdens, has been given to 'the council and community of the burgh;' an expression not denoting the inhabitants at large, but the magistrates and town-council, who, in the contemplation of law, represent the whole. Brady on Burghs, p. 17. 20. 70.; Wight on Elections, p. 27.

In the exercise of this power, the magistrates have not been restrained, either as to the *amount* of the duty, or as to the particular *object* of it. Such a restriction would have been highly inexpedient; because the funds to be levied ought to bear proportion, in every town, and at every period, to the manners, wealth, and numbers of the inhabitants. And as to the *place* in which the duty is to be demanded, the authority of the magistrates is equally uncontrolled. Before the erection of proper markets, no space of ground within the territory of the town could be entitled to an exemption; and, after the buildings necessary for that purpose have been provided at the expence of the community, additional reasons occur for defraying such expence by a general contribution. To permit individuals to sell goods in their shops, without paying the duties exigible on them in the market place, must then become altogether unjust; while a like practice in the streets is liable to the additional objection, of creating an unnecessary embarrassment in those public passages of the burgh.

It is, however, a mistake to consider the duty in question as entirely new. It is rather to be viewed as a *commutation* for those formerly established. Potatoes, from being an article of luxury rather than of ordinary consumption, have now become in a great measure, a substitute for oat-meal; on which, as well as on almost every other commodity of the same kind, a custom or duty has been, past all memory, levied in this and other burghs. What greater reason, then, of complaint can the pursuers urge on this than on former occasions, when, upon the introduction of new sorts of vegetables, instead of those anciently used, an extension of the old duties took place? To require the authority of Parliament on every change of this nature, for preserving the revenues of the burgh in their former extent, would be a heavy loss to all concerned.

Answered for the pursuers: The power of exacting money from individuals, either in the way of a direct tax, or of a duty on the sale or import of commodities, is one of the most important that can exist in society. To intrust it to any one man, or to any set of men, without the consent of the whole, is adverse to the first principles of a free government; and in the hands of magistrates in royal burghs, self-elected, and liable to almost no after accounting for their administration in office, it would be attended with the worst consequences.

It is true, that in those unsettled times which preceded the Revolution, the rights of the subject were not, in this respect, so well understood or observed. As our kings could alone afford protection to merchants, they were thence induced to claim, and afterwards to communicate to others, a right of exacting

taxes or customs on all goods brought within the ports of the kingdom, or sold at the public fairs or markets. But at a very early period, the levying of *unusual* customs was declared contrary to law; 1587, c. 54. In order to provide for an extraordinary emergence in royal burghs, a particular method of proceeding was prescribed for imposing a general taxation on the inhabitants, in the way agreed on by themselves, 1592, c. 155; to which last enactment, the clauses occurring in the charters of the town of Glasgow evidently relate: And, by the famous Bill of Rights, the power here claimed, as it never could be *constitutionally* exercised, was finally abolished.

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From thenceforward it has been an invariable maxim, That the King can neither by himself, nor by the intervention of others, impose a burden on any part of the community without their consent in Parliament; and though the duties hitherto levied in royal burghs, have not been taken away, they cannot, either by increase of the sums formerly paid, or by an extension to articles formerly exempted, admit of augmentation. Accordingly, it has been so decided, as often as the question occurred; and the various statutes, authorising additional duties in these communities, by imposts on ale, spirits, &c. have given a legal sanction to these precedents; 15th November 1754, Magistrates of Lauder *contra* Brown, No 101. p. 1987.; 14th June 1762, Earl of Moray *contra* Magistrates of Kinghorn, No 102. p. 1988.; 1st March 1769, Lord Kennet *contra* Lady Frances Erskine, Fac. Col. No 91. p. 342. *voce* PRESCRIPTION; 15th June 1781, Tod and others *contra* Magistrates of St Andrew's, No 106. p. 1997.

Neither can the magistrates of a royal burgh, by the erection of public markets, create to themselves a power which they did not before enjoy. Where such buildings have been raised on grounds belonging to the community, an adequate hire or recompence may, without challenge, be claimed from those who carry thither their commodities for sale; but the merchants cannot, under this pretence, be compelled to abandon their shops, and to sell at the discretion of the magistrates, their goods, or any part of them, in the public markets only. To preserve also the free use of the public streets, all sales in temporary booths, or from carts, may be prohibited; but it were surely most unreasonable, that the magistrates should be authorised to compound for this or any other nuisance, in order to increase the revenues of the town.

On the part of the magistrates, it was separately *contended*, That they had acquired, by *possession*, a right to exact the duty in question; because, notwithstanding the introduction of potatoes was recent, the town's tacksmen had ever since claimed, and generally levied, a custom on this article, though not precisely on the same footing, nor in the same extent, with that now demanded. The other party also maintained, that the duty was at any rate exorbitant.

The first judgment of the Court was in these words: ' THE LORDS having advised memorials for the parties, testimonies of the witnesses adduced, and writs produced, and having heard parties procurators thereon; repel the defences pleaded for the magistrates of Glasgow; find they have no right to impose or levy

No 108. any impost, duty, custom, or tax, on potatoes brought into Glasgow, and sold either on carts in the streets, or by retail in houses or shops.'

Thereafter, however, on advising a reclaiming petition, with answers, which were followed with memorials, the Lords pronounced this judgment :

' Find, That the magistrates of Glasgow have a right to establish proper market places within the burgh, and to impose and levy small duties on potatoes, or other commodities sold therein : Find, That on potatoes sold in the streets, shops, cellars, or elsewhere within the burgh, the magistrates may levy the same dues as when they are sold in the market places ; but find, That the duties lately imposed on potatoes are too high ; and remit to the Lord Ordinary to proceed accordingly.'

Lord Ordinary, *Braxfield.* Act. Dean of Faculty, Solicitor-General Blair, *Morthland,*
J. Miller, jun. Alt. Lord Advocate, *Craig, A. Campbell.* Clerk, *Sinclair.*
Fol. Dic. v. 3. p. 102. Fac. Col. No 284. p. 436.

* * See Skene against Ross, 17th June 1794, *voce* JURISDICTION.

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A salmon fishing belonged to a community. The burgesses had been in use to fish individually. The Magistrates let the fishing to a tacksman. Found, that no right belonged to the burgesses, as distinguished from the community. The Magistrates represented the community ; and therefore were entitled to assume this act of management.

1786. July 19.

ROBERT FRAM and Others, *against* The MAGISTRATES of Dumbarton.

By the charters from the Crown, in favour of the town of Dumbarton, a right of salmon fishing was conferred on ' the bailies, *burgesses*, counsellors, community, and *inhabitants*.'

In very ancient times, it appeared that the burgesses, in person, exercised this right, on paying a trifling yearly duty for each coble or boat to the magistrates.

Afterwards, for more than a century, the fishings were let to tacksmen, who became bound to expose in the market place, at certain low rates, either the whole fishes caught, or a quantity thought sufficient to answer the demands of the town's people.

In the year 1783, the magistrates having let the fishings without any restriction, Robert Fram, and other burgesses, insisted in a declaratory action, for ascertaining their right to be provided with salmon in the manner formerly practised. They *contended*, That the salmon fishing in question had been conveyed to the *burgesses* individually ; and that the low prices hitherto paid, were to be considered merely as a composition agreed on between the burgesses and the magistrates, the former being thus enabled, instead of fishing for the use of their families, to apply themselves to other and more profitable pursuits.

THE COURT, however, were of opinion, That no right was here intended in favour of the *burgesses*, as distinguished from the *community* of the burgh, represented by the magistrates ; and that the magistrates, without any regard to former practice, were authorised to grant leases of this, in the same manner as of the other property of the town, whenever the general advantage of the inhabi-