Officers of State in this case, but prejudice to his Majesty's advocate to appear if he think fit. I remember, in the Parl. 1672, there was an overture brought in, that all the freeholders and vassals, whatever their holding was, might be obliged to attend the Michaelmas head-court; but by a vote it carried in the negative; only the Sheriff had the interest that it was omitted to be marked in the list of the unprinted acts. See this also determined by the 2d Cap. 2d St. Rob. I. No. 4.

The Lords, on the 17th January, 1700, found him, as a blench or feu-holder, not liable to suit and presence, but exeemed.

Fol. Dic. v. 2. *p.* 406. *Fountainhall, v.* 2. *p.* 74.

SECT. II.

Privilege of brewing without the Superior's Licence.

1681. *December* 24. SIR PATRICK NISBET *against* ROBERTSON.

In the action of declarator, pursued by Sir Patrick Nisbet, as Baron of the Barony of Dean, against Robertson, one of his feuers, wherein he craved, That the said Robertson, might not have liberty to brew, not being infeft *cum brueriis*, without license of Sir Patrick Nisbet, who was superior and baron of the barony, whereof the said feu was a part; the Lords found, That the feuer, being infeft in his feu by his superior, might brew, or use any other manufactory, without the superior's licence; and that these words, *cum brueriis*, were only exegetic; and that the nature of the feu did imply the same, though not expressed: And therefore assoilzied the defender. No. 5.

Fol. Dic. v. 2. *p.* 406. *P. Falconer, No.* 14. *p.* 6.

Sir P. Home reports this case:

Sir Patrick Nisbet, as infeft in the Barony of Dean, having pursued Thomas Robertson, and other brewers, to desist from brewing and topping of ale within his barony; alleged for the defenders, That there is no law for prohibiting tenants or vassals from brewing or topping of ale within a barony; and if there were any such law to give a Baron that power, it is now in desuetude; and if it were in the Baron's power to hinder the brewing of ale within his bounds, it would give a great occasion of oppression, for then the Baron would hinder any to brew within his bounds, unless they paid what price for his bear he pleased; and it would be prejudicial to the King as to the excise, and to the whole lieges, who would be necessitated to buy the drink at a dearer rate, and such a prohibition is against the current of the laws and acts of Parliament which appoint the setting up of ale-

No. 5. houses and brew-houses, for the conveniency of the lieges and strangers, and particularly by the 18th act, Parl. 4. James V.—and whatever might be pretended, in case a tenant were setting up a brewery, that his master might hinder him, yet when the same is actually set up, the tenants of the barony have been in the immemorial possession of brewing and topping of ale, the master cannot hinder a thing so much for the public good; and albeit he could hinder a tenant, yet he cannot hinder the defenders, who are vassals and feuers, and who have already built malt barns and kilns, and they and their predecessors have been in constant and immemorial possession in brewing and topping of ale; albeit the defender's charter does not bear that clause, *cum brasinis et brueriis*, yet that is a necessary consequence of the property; and Craig, Lib. 2. Dieg. 3. affirms, that such clauses majis exegeticæ quam ex necessitate opinuntur, neque debentur non expressæ; so that a Baron, as superior, cannot hinder his vassal to brew or sell ale, but all that he is empowered to do, by the act of Parliament, is only, as judge, to regulate the abuses committed by the brewers within the barony; and they being infeft, and forty years in possession, albeit the pursuer had power as a Baron to hinder the defenders to brew or sell ale, yet they having now prescribed a freedom, he cannot hinder them to brew or sell ale as they and their predecessors had been in use to do these forty years bye-past.

Answered: That by the 30th act, Parl. 4. James V. Barons are empowered to make diligent inquisition, and take knowledge of the price of victuals, and all other stuff wrought by any workman within the barony, and that they set and ordain price, goodness, and fineness, upon bread and other necessaries, and if any person shall take exorbitant price for his stuff, that he be punished, by taking an unlaw of the Court for the first time, and an unlaw for the escheating of the stuff that he has sold the second time; and act 18. Parl. 4. James V. and act 121. Parl. 7. James VI.—which necessarily implies that no person shall brew or sell ale within the barony, except he have licence from the Baron for that effect; and Craig, Lib. 2. Dieg. 8. is clear of the opinion, that the clause, Fabrilia et brasinæ solent exprimi, quia antiquitus non licebat, ubicunque quis vellet, fabricam extruere, neque brasinam aut brueriam exercere, nisi expresse a domino concederetur; and the reason there given is because ordinarily a great many people did resort to these houses, which was a great advantage; therefore the master did retain that privilege to himself, or any other person, to set up a brewery to sell ale within his bounds, unless he had granted express right to the same; and by that same reason, neither smiths nor wrights, nor other trades, could exercise their trade within the barony without licence, albeit they be of greater use to the public for making the instruments of labouring them, than the brewing or selling of ale, and which is not only extended to tenants, but even to feuers and vassals, unless expressly granted by the superior, who has not only power to regulate abuses, (which power he still retains, albeit he grant a liberty to brew and sell ale), but also may stop and hinder them to brew any at all without licence, that being a casuality to the Baron, by which he makes advantage, by getting a composition for granting such 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.