

1712. *January 29.*BOSWELL and Others, Justices of Peace of Ayrshire, *against* THOMAS GRAY,  
Merchant in Irvine, and Others.

No 17.  
Certain persons being fined for importing Irish victual, the Lords, in a suspension found, that this delinquency was probable by oath, in the same manner as usury.  
See No 19.  
P. 9402.

THERE being a general clamour and complaint, by the heritors and gentry in the western coasts, of the importation of victual and other goods from Ireiand, contrary to many acts of Parliament; and the inhabitants of Irving being mainly guilty of this abuse, by stealing it in by night at many secret creeks on that shore; and the outcry being flagrant, the Justices of Peace of that shire call the said Gray, and a great many others delated as criminals before them, for contravention of these necessary penal statutes against Irish meal; and in regard of their contumacy in not appearing, fine them in L. 100 Sterling the piece. Which decret the burghers and their Magistrates suspend, on these reasons, *imo*, That it was given *a non suo iudice*, the inhabitants of Irving not being obliged to answer to any other jurisdiction in such cases, but their own Magistrates, who are their only competent Judges *privative* of all others; in so far as the town of Irving have a charter in 1511, ratified in Parliament, not only giving them the jurisdiction over their own burgesses, but also a power of repledgiation from all other courts; and which was ever sustained in the justice court in 1586, in the case of one of their citizens pursued for mutilation, who on production of their charter was remitted back to be tried by themselves; and the 61st chap. of the *leges burgorum* seems to invest other royal burghs with the like privilege, founded on the ease and conveniency of the poor lieges to be judged at home, and not drawn to remote distant courts. *Answered*, These ancient exorbitant privileges are long ago obsolete, disused and prescribed *non utendo*; and being long before the institution of the College of Justice and the Justice of Peace courts, erected with a cumulative power, it is ridiculous in them to pretend a privative exclusive jurisdiction. Besides, these penal laws against importing Irish victual are long posterior to that charter, and empower all the Judges Ordinary to cognosce thereupon, as appears by the 38th act 1661, settling the Justices of Peace power; and which now by a British act since the Union is enlarged to all that the Justices of Peace in England enjoy; and there can be nothing more express than the third act 1672, act 14th 1686; and act 9th 1703; where the restraining the import of Irish meal is committed to all Judges. Next, their repledgiation is only in cases that go to an inquest and assize, which this does not. Though in King James the IVth's reign many civil cases were tried by inquests, as they are still in England, though gone into desuetude with us, except in serving heirs and some few cases more. And it is hoped the town of Irving will not claim more than the Lords of Regality; and yet they, since the last constitution and establishment of the criminal court in 1672, have never been allowed to repledge, on their offer to find caution of Colreach, but only permitted to sit as adjuncts if they please.

And it was refused to the Duke of Hamilton for his regality of Borrowstounness and Kiannel. And the Magistrates are so far from being the fittest Judges in these cases, that the law looks upon them with a jealous eye, as favouring the burgesses, and making their towns sanctuaries for resetting such criminals; and whereof they gave an evident demonstration: For, to prevent the Justices of Peace, they caused pursue the importers, and on a sham probation assoilzied them. *Replied*, Such privileges being *actus mera facultatis* never prescribe *non utendo*, unless they be repelled *in judicio contradictorio*, or a contrary practice introduced; for it may be, no occasion for exercising that right occurs for many years, and so disuse can never lose it; and it is not to be presumed Magistrates will act contrary to law, or go beyond the sphere of their duty, to palliate abusive practices so prejudicial to the general good of the nation. THE LORDS repelled the *first* reason, and found the Justices of the Peace competent, and the town's jurisdiction not privative, but only cumulative; and that their right of repledging was in desuetude. The *second* reason of suspension was, that the manner of probation, by referring the transgression to their oaths, was illegal and unwarrantable, being for a crime. *Answered*, It was only pursued *ad civilem effectum* for a pecuniary mulct, and not any corporal punishment: And though they are to be sent as recruits abroad, yet that is only an useful disposal of such as will not live regularly, but are always doing mischief while suffered to stay at home. THE LORDS repelled this reason also; and found it probable by oath, as well as usury and other such like are. The *third* reason was, that the fine is most exorbitant; for though the act 1672 speaks of L. 100 Sterling, that is only of heritors and Magistrates of burghs. THE LORDS thought all could not be classed under the same fine; for one who had only brought in a boll or two, was not to be so deeply fined, as he who had brought in an hundred, and had oft reiterate his transgression; and a poor man's fine was not by *magna charta* to be so great as a rich and wealthy transgressor's: And therefore the LORDS reponed them to their oaths, and prorogated the diet, and allowed the Ordinary to consider the quality and frequency of the transgressions, with the circumstances, condition and ability of the party, and accordingly to modify and adjust the fine as he saw just. *Ex relatione Domini de Minto*.

This importation of meal is good for the poor; plenty making it cheap; but it sinks the gentlemen's rents in these western shires. Which of the two is the greater prejudice to the bulk of the nation, *problema esto*: Where we must likewise balance the loss and damage we suffer, by the exporting so much of our money in specie to a foreign country to buy it, which diminishes our coin, *pro tanto*: But if the victual was purchased in Ireland by exchange of our goods, given for it, that takes away that objection founded on the exporting our money. See PRESCRIPTION.

*Fol. Dic. v. 2. p. 14. Fountainhall, v. 2. p. 712.*

\* \* Forbes's report of this case is No 316. p. 7599, *vocæ* JURISDICTION.