

No 100.

The magistrates of a royal burgh have no power to restrain the inhabitants from importing ale : a power which a Baron would have over a burgh of Barony.

1752. July 8.

The BURGH of PERTH *against* ALEXANDER CLUNIE and Others.

ALEXANDER CLUNIE and others, burgesses and inhabitants of Perth, having purchased a piece of land in the neighbourhood of the burgh of Perth, and without the privileges thereof, did thereon erect a brewery, and imported their ale into the burgh for the use of the inhabitants. Of this the brewers residing in the burgh complained to the magistrates, as what was highly prejudicial to them, who were liable to the burdens of the burgh, particularly to the multure of their malt at the town's mills, while the said Clunie and others, who were not liable to such burdens, were in condition to undersell them. To which complaint the magistrates hearkened, and by their act of council inhibited and discharged the inhabitants of the burgh, in all time coming, to import into the town, any beer or ale brewed without the liberties of the burgh, under the penalty of L 5 Sterling for each transgression.

Clunie and his partners being advised that the magistrates had no authority to make such an act, continued to import their ale ; and the procurator-fiscal having pursued them for the L. 5, as the penalty of their first transgression ; and they having objected to the authority of the act, the magistrates repelled the objection.

The company presented a bill of advocation, and the pursuers having consented to discuss upon the bill, the LORDS unanimously 'assoilzied the defenders.'

The whole of the question turned upon this, Whether burghs-royal, some of which have the jurisdiction of baron given them in their erection, have the same power as to the inhabitants of the burgh as barons have with respect to the inhabitants of the barony, on whom the baron may put what restraint he pleases with respect to brewing. This I say was the whole of the question, for the disappointing the town of the mill-multures was not pretended to be any justification of the act of council. And the LORDS were of opinion, that the magistrates of a burgh-royal had no such powers in that matter as barons have.

A baron can not only restrain the importation of ale, but even prohibit the bringing ale for sale within his territory : As proprietor, he can remove every inhabitant of his territory, who, so long as they reside, must submit to what lawful rules he prescribes : Whereas burghs-royal are not of the nature of private grants of property : They are all established for the general benefit and utility of the nation ; neither the territory erected into a burgh, nor the freedom of the burgh can be alienated, as they are *inter regalia* ; the magistrates have no property in the burgh, the bailies are the King's bailies, and every individual the King's vassal in his burgage tenement ; and even where a right of barony is given in the erection, it imports no more than the addition of a jurisdiction, which the simple erection of a burgh does not give, but by no means gives such power to the magistrates and council over the inhabitants as barons

have over the inhabitants in their property. The power here contended for by the town council appears to be contrary to the common sense of the nation, and the understanding of all the other royal burghs, who, though equally willing as the town of Perth to extend their authority, never dreamed of a power to restrain any of their inhabitants from serving themselves with the necessaries of life, as they can be best served. And last of all, the several statutes imposing the two pennies of the pint upon ale brewed, imported, and vended within the burgh, is a declaration of the legislature, that it is the privilege of the lieges in general to import ale into the burgh in the same free manner as any other commodity, not falling under the exclusive privileges of any incorporation, and there can be no corporation of brewers. (See This case as reported in the Fac. Col. and by Lord Kames, No 67. p. 1936.)

*Kilkerran, (BURGH ROYAL) No 10. p. 113.*

1754. November 15.

MAGISTRATES and TOWN COUNCIL of LAUDER, *against* THOMAS BROWN.

THE Magistrates and Town Council of Lauder charged Brown for payment of a toll of two shillings Scots for each loaded cart belonging to him, and passing through the liberties of Lauder: Of this charge Brown obtained suspension.

The Magistrates, in support of their charge, produced a charter of confirmation, granted to the burgh of Lauder in 1502, by James IV. and containing a general clause, *cum omnibus annuis redditibus et possessionibus quibuscunque*; which charter was ratified by Parliament in the year 1633. They also produced, from the books of town council, a table of customs, dated in 1703, and bearing *for ilk long cart two shillings*: And they offered to prove immemorial possession of the toll demanded.

A proof was before answer granted; and the case was reported by Mr William Grant of Prestongrange, Lord Probationer.

The defender *pleaded*, in point of relevancy, *1mo*, That highways are *juris publici*, and that a toll to be levied on them may not be granted, but by the joint authority of King and Parliament; and so the Court expressly found, 15th November 1621, Town of Linlithgow against Fleshers of Edinburgh, *voce* PRESCRIPTION.. The ratification in 1633 does not afford any argument in support of the toll; for that such ratifications passed of course, and without being particularly considered. *2do, et separatim*, That the charter, on which the chargers founded, contains no special grant of tolls; and immemorial possession cannot support an exaction to which no title whatever is pretended.

*Answered* for the pursuers: The Crown of Scotland had an undoubted right of imposing tolls, to be levied on all carriages passing through certain places; many such tolls have been so established without the authority of Parliament.

No 100.

No 101.

A royal burgh had a charter, containing a general clause, *cum omnibus annuis redditibus et possessionibus quibuscunque*. Having for upwards of 40 years exacted a toll for every loaded cart passing through the liberties, the burgh was found entitled to continue that toll.