granted to another, on his applying for it, a liberty of casting peats in his moss, which could never constitute a servitude, or oblige the one to continue the favour to the other any longer than he pleased. No 69.

'THE LORDS repelled the reasons of suspension, and found the letters orderly 'proceeded.'

Reporter, *Lord Minto.* For the Chargers, *Advocatus.* For the Suspender, *Ro. Craigie.* Clerk, *Gibson.*

Bruce. *Fol. Dic. v. 3. p. 104. Fac. Col. No 53. p. 78.*

1755. *July* 16.

The BURGH of KIRKWALL *against* The INHABITANTS of STROMNESS.

No 70.
The privileges of a royal burgh, granted by acts of Parliament against unfree traders, entitle only to seize and escheat unfree goods apprehended, not to insist in a process of damages.

The royal burgh of Kirkwall being jealous of the village of Stromness, where there is a good harbour, and suspecting that its privileges of foreign trade were encroached upon by the inhabitants of that village, took the following method for redress. In the name of the town-treasurer, a petition was preferred to the sheriff-depute of Orkney, against 108 inhabitants of the town of Stromness, bearing, that the persons named had each of them in their possession goods and merchandise to the value of L. 100 Sterling, which had been imported, or otherwise traded for by them, or by other persons unfreemen, contrary to law; and, therefore, praying warrant of arrestment. The warrant was granted accordingly, 'To fence and arrest all and sundry moveable goods, merchant goods, *&c.* 'pertaining to the persons named, to remain under sure fence and arrestment, 'till sufficient caution is found that the same shall be made furthcoming to the 'complainer, as accords of the law.'

Upon this extraordinary arrestment, the treasurer brought a process of furthcoming before the Sheriff of Orkney, as if it had been an arrestment *debiti servandi causa*; and it being referred to the oaths of the defenders, what foreign goods they had in their possession in which they had unlawfully trafficked, decreet went against those who refused to depone, decerning each of them in the sum of L. 50 Sterling, as the supposed value of the smuggled goods.

In a suspension of this decree, the LORD ORDINARY found, 'That by the act of Parliament 1672, the unfree goods and merchandise, supposed to be in the suspenders hands, are attachable by arrestment: That a process of furthcoming upon these arrestments is competent for declaring the goods escheat: That the goods so arrested in their hands, and values thereof, may be proved by their oaths; and, therefore, repelled the reasons of suspension; but reponed the defenders against the decreet, in case they take a day to depone in the furthcoming.'

No 70.

This matter being brought before the Court, by reclaiming petition, it was thought worthy of a hearing in presence; and, at advising the cause, the Judges were far from being unanimous. Many of them doubted of the legality of the arrestment. Arrestments are but of two kinds, one to secure a subject in controversy, and one preparatory to making a debt effectual out of the debtor's moveables. The warrant of arrestment in the present case, is of neither kind. It gives authority to arrest all moveable goods pertaining to 108 inhabitants of Stromness, till caution be found that the said goods shall be made furthcoming to the complainer. Here no debt is either specified or supposed; and, therefore, it cannot be an arrestment in order to operate payment of a debt. Here no controverted subject is claimed by the pursuer as his property, to be secured by arrestment till the controversy be determined. What foundation is there in law for arresting in general the person's whole moveables? By the tenor of the warrant, this arrestment may be used even in the proprietor's own hands, and in fact is so used. How is this consistent with law, after moveables are exempted from inhibition? This is still more oppressive than an inhibition of moveables, as it condescends on no debt nor any just cause of arrestment. The stile of all executions are inviolable. The Court of Session, not to talk of the Sheriff, has no authority to invent a new species of arrestment, more than of horning, poinding, inhibition, or adjudication.

But the matter was taken up more directly upon the meaning of the act 1672. It was observed, that the act 154th, Parl. 1592, is the first that privileges royal burghs to seize and apprehend unfree goods; impowering them, *1mo*, To search for such goods; *2do*, To arrest or apprehend the same after they are found; *3tio*, To have them declared escheat. By this act, in whatever sense arrestment be taken, it is plain that arrestment cannot be used till after the subject is apprehended. In the next place, both by this act and by the act 5th, Parl. 1672, it is extremely clear, that seizing and escheating the unfree goods is the only punishment. Not a single hint of damages; yet the professed intention of the present process is to make the inhabitants of Stromness liable for a sum in name of damages, for their unfree trade, and encroaching upon the monopoly which the royal burghs have of foreign trade. This is directly in face of an inviolable rule, that where a monopoly is created by statute, and guarded by certain penalties without mention of damages, the monopolist is confined to the penalties, and has no claim for damages, whatever may have been the encroachments upon this exclusive privilege. This was solemnly determined, Booksellers of London *contra* Booksellers of Edinburgh and Glasgow. *See* LITERARY PROPERTY.

It was further observed, that there would be no foundation for such an arrestment within burgh; and to sustain it out of the bounds of the royalty, would in reality be giving to royal burghs a more effectual and extensive remedy against smugglers, who are not subjected to their jurisdiction, than against those who are; which certainly was not intended by the statute. The arrestment men-

tioned in this statute cannot be that now insisted on; because when the statute was made, no such arrestment was known in the practice of Scotland. But we are at no loss about the meaning of the arrestment mentioned in the statute. It can only be laid on after the goods *ipsa corpora* are apprehended; and the intention of the arrestment is to secure them where they are found, till they be condemned as escheat in a regular process. So that the arrestment mentioned in the statute is of the first kind specified above, viz. to secure a controverted subject. And upon the whole, the method chalked out by the statute is plainly this: Unfree goods, when discovered and known to be in a certain place, may be arrested for preservation, till a process be brought for escheating them. If only suspected, a warrant may be obtained from a magistrate to search for such goods, as well as to search for stolen goods; and if found, arrestment ensues, and then forfeiture. No 70.

'THE LORDS accordingly found, that the goods not having been apprehended and arrested in the hands of the suspenders, are not subject to confiscation; and that the suspenders are not bound to depone upon the quantities in their hands.'

And this interlocutor was ultimately adhered to, (and affirmed on appeal.)

Fol. Dic. v. 3. p. 109. Sel. Dec. No 92. p. 123.

*** The same case is reported in the Faculty Collection:

February 24. 1756.

BY many acts of Parliament, the freemen of royal burghs have an exclusive privilege of importing certain commodities, as wines, wax, spices, silks, &c.; and by act 5. 1672, it is declared, 'That if any man, not being freeman in the royal 'burghs, shall be found to have in his possession any goods or commodities to 'be bought or sold, exported or imported by him, contrary to this present sta-'tute, and the privilege of the royal burghs granted thereby; the saids whole 'goods shall be escheat, the one half to his Majesty, and the other half to the burgh 'apprehender: and that, if the saids goods be apprehended within any of the 'saids royal burghs, or the suburbs or appendicles belonging to them, or within 'their ports or harbours, the samin shall be summarily seized and secured, as 'goods escheat in manner foresaid; but if the saids goods, competent only to 'freemen of the royal burghs, shall be found, or alleged to be found elsewhere, 'they shall only be arrested and pursued to be declared escheat, to be divided 'in manner above-written, before any judication as accords of the laws: And 'that, upon pretence thereof, the magistrates of burghs, or others by commis-'sion from them, or any of their inhabitants, shall not search or seize upon any 'goods, or any way trouble or molest his Majesty's good subjects living without 'the bounds of their said burghs or suburbs, summarily, and by way of fact, but 'only by legal process, according to law, upon the pretence of any privilege,

No 70. ' custom, or usage whatsoever, unless the persons be deprehended in the present ' and actual transgression of the privileges of the royal burghs above-written, ' and that within the bounds of the saids burghs, suburbs, and ports thereof, ' under the pain of being proceeded against as committers of riot, and disturbers ' of his Majesty's peace.'

The burgh of Kirkwall, under pretence that the inhabitants of Stromness imported prohibited goods, obtained from the Sheriff of the county warrants of arrestment, and arrested in the hands of many of the inhabitants of Stromness, all such prohibited goods as were then in their possession. Upon this arrestment the burgh obtained a decreet of furthcoming, and took decreet against the several arrestees for L. 50 each, as held confessed, for not deponing in the furthcoming.

The inhabitants of Stromness suspended, and *pleaded*, That only the actual seizure of the prohibited goods, and not the arrestment of them, could be the foundation for a process against them: That prior to the act 1672, the magistrates could seize the prohibited goods, whether found within or without burgh: That by the act 1672, the law remained the same as to goods found within burgh; and an alteration was made as to goods found without burgh, namely, that the magistrates, instead of seizing them directly themselves, were obliged to apply to the Judge Ordinary to make the seizure: That to *seize* and to *arrest* were synonymous terms in the old law-books of Scotland; and therefore, when in the latter part of the clause of the statute, the magistrates were called to *arrest*, that meant they were to *seize*, as much as when, in the former part of the statute, they were allowed to *seize*; and therefore, either within or without burgh, the actual seizure was the first step necessary in order to afford a foundation for the process: That arrestments of moveables, in the hands of a party, were contrary to the genius of our law, which allowed no embargoes of this kind upon moveables; and that it was still more repugnant to the genius of our law to compel the subjects in penal cases, where forfeitures are to ensue, to swear either against or for themselves.

Pleaded for the burgh, That, prior to the act 1672, the magistrates could seize the prohibited goods, whether within or without burgh: That the seizure, in this last case, stretching the jurisdiction of the burgh without its bounds, seemed too great a power; and therefore a check was put to it by the act 1672, namely, that without their own bounds, the magistrates should only arrest, in order to be a foundation for an action: That, though the words *seizure* and *arrestment* were synonymous in the old law-books, yet, long prior to the act 1672, they had a meaning fixed totally different from each other; and accordingly, they are contradistinguised in the former and latter part of the clause in question.

' THE LORDS found, That the goods not having been deprehended and arrested in the hands of the suspenders, are not subject to confiscation;

and that the suspenders are not obliged to depone upon the quantities in their hands. No 70.

Act. *Ferguson et alii.* Alt. *Lockhart et alii.* Clerk, *Pringle.*

Sir J. Dalrymple. *Fac. Col. No 189. p. 281.*

The House of Lords Ordered and Adjudged, That this interlocutor be affirmed.

1756. *December* 10.

The Corporation of Taylors in Perth, *against* Mary Lion and Others, Mantua-makers there.

No 71.
Mantua-Makers may exercise their employment within a royal burgh, without being free of the incorporation of taylors.

The incorporation of the Taylors of Perth brought a process against three mantua-makers in that town, for incroaching upon their craft without being free thereof; and concluding, that the defenders should be decerned to desist in all time coming; find caution to that effect; and pay L. 20 Sterling of damages. This process, which was commenced before the Bailies of Perth, was brought by advocation before the Court of Session. The defence was, That mantua-making was no branch of the taylor craft, which concerned only making of men's clothes; and that there was an impropriety and indecency in a man's being employed to make clothes for women.

This defence being reported to the Court, it occurred at advising, that women are not capable to be admitted into a craft, to perform any office in a craft, or to enjoy any of its privileges; that the pursuers accordingly neither do nor can offer to admit them, but only that they must be prohibited from working altogether; that this is putting them in a worse condition than unfreemen, who are entitled to be admitted upon giving an essay and paying an upset; that this is treating women as if they were not free-born subjects, prohibiting them to gain their bread by their labour. Hence it was inferred, that the laws and regulations about crafts and royal burghs were made for men only, and that women can neither be benefited nor hurt by them.

It was further observed, that, strictly speaking, it is not every person who makes use of a needle that is a taylor. A glover is not a taylor, neither is a mantua-maker. And it was added, that to confine to the men the making of under petticoats, and perhaps drawers, for women of condition, would be a very extraordinary monopoly.

'The action was accordingly dismissed as not being founded on law.'

Fol. Dic. v. 3. p. 106. Sel. Dec. No 118. p. 169.

*** The same case is reported in the Faculty Collection:

Perth was erected into a royal burgh by William I. in the year 1210. The taylors of Perth have no *seal of cause*, but they have been held immemorially