

No 75.

Edinburgh became superiors of the burgh ; and unless suburbs of this kind are understood to have been meant by the act 1592, that statute can have no meaning at all ; since there was no occasion for a statute with respect to suburbs, which were situated within the bounds and liberties of a royal burgh ; because, as to these, the very constitution of incorporations gave them an exclusive privilege.

‘ THE LORDS found, That the barbers of the burgh and regality of the Canongate were not subject to the incorporation of barbers of the city of Edinburgh, or liable in payment to them of any sums of money ; and therefore assoilzied.’

Act. *Johnstone, Ferguson.*

Alt. *Lockhart.*

Thereafter the society of barbers of the Canongate insisted in a process for having it found and declared, That the barbers of Edinburgh were not an incorporation, having exclusive privileges of exercising their employment within the city ; and that they, the pursuers, had good right and title to shave beards, clip, trim, and dress hair, within the city of Edinburgh, and liberties thereof. The decision of this question depended on the import of a variety of writings, acts of council, and seals of cause, which it is of no importance to state.

‘ THE LORDS assoilzied ; and found the defenders entitled to their expences.’

Act. *Rae.*

Alt. *Johnstone.*

Clerk, *Pringle.*

I. Campbell.

Fol. Dic. v. 3. p. 107. Fac. Col. No 252. p. 458.

1761. February 17.

PROCURATOR-FISCAL of PAISLEY against The INCORPORATION of WRIGHTS.

No 76.
The magistrates of a burgh, by immemorial possession, gain an exclusive privilege of keeping mort-cloths to be let out for hire.

THE magistrates and town-council of Paisley had been in use, for time immemorial, to keep and let out mort-cloths for the funerals of all such as died within the burgh, at certain prices, and the profits thence arising were distributed among the poor.

The incorporation of wrights having purchased mort-cloths, in order to let them out in the same manner, the magistrates made an act of council, discharging the inhabitants of the burgh from keeping mort-cloths to be let out for hire under the penalty of five pounds Scots for each transgression, besides forfeiting the mort-cloth.

The wrights having let out their mort-cloth at a burial, it was seized by order of the magistrates ; and, upon a complaint at the instance of the procurator-fiscal, the wrights were fined in five pounds Scots, and the mort-cloth was ordained to be restored upon their instructing that it was the property of their poor, and purchased with the money of their incorporation.

This question having been brought into the Court of Session by advocacy, the Lord Ordinary pronounced this interlocutor : ‘ Having considered the deci-

‘ sion of this Court in August 1756, between the kirk-session of Kippen and certain inhabitants of that parish, repels the reasons of advocacy, in respect of the answers, and remits the cause.’ See KIRK-SESSION.

It was *pleaded* for the wrights, in a reclaiming petition, That, though it was found by the decision referred to by the Lord Ordinary, that the kirk-session had gained, by prescription, an exclusive right of keeping mort-cloths, this cannot affect the present question: That a kirk-session is a sort of ecclesiastical court in a parish, and has by law the care of collecting and distributing alms, and other funds belonging to the poor: That, in more ancient times, the kirk-session might have had the superintendency of funerals for the purpose of collecting the alms and church-dues, and for furnishing the mort-cloths, and other things necessary upon these occasions; and that such right, founded on the public law, may be supported by immemorial possession: That the magistrates of a town have no such right; they have not the same care of the poor or their funds committed to them; and therefore, though they may have enjoyed the exclusive privilege of keeping mort-cloths for time immemorial, this cannot bar others from doing the same thing: That all monopolies are unfavourable, and no length of possession can entitle the magistrates to assume to themselves this exclusive privilege of keeping mort-cloths.

It was *answered* for the magistrates, That the decision quoted is entirely in point to the present question. A kirk session has no exclusive right of managing the poor’s funds; but this trust may be as properly discharged by the magistrates of a burgh; and possession alone can determine the right of administration: Though kirk-sessions have the disposal of money collected at the kirk-doors, and are generally intrusted with the management of such sums as are mortified to the use of the poor, they have no legal claim to the administration of any fund allotted to the poor, that either has, by deeds of private parties, or by long custom, been intrusted to other hands: That it was not on account of any presumed title in the kirk-session of Kippen that the Court determined in their favour, but it was because of their immemorial possession; and as it cannot be denied, that the magistrates of Paisley have enjoyed, past memory of man, an exclusive privilege of keeping mort-cloths, their right cannot now be challenged or encroached upon: That the word *monopoly* relates only to exclusive branches of trade carried on by persons or societies for their own private interest; but where a fund is established either by law or custom for a public and lawful use, that can by no means be denominated a monopoly, though individuals are barred from destroying such public fund, and deprived of those privileges from the exercise of which it arises.

‘ THE LORDS affirmed the Lord Ordinary’s interlocutor, remitting the cause, with this instruction, That the magistrates restore the mort-cloth to the incorporation.’ See KIRK-SESSION.

Act. *David Dalrymple.*

Alt. *Wight.*

Clerk, *Justice.*

P. Murray.

Fol. Dic. v. 3. p. 109. Fac. Col. No 23. p. 45.