

No 101. The decision produced for the defender is either erroneous, or founded on some special circumstances omitted by Durie, (p. 3.) The grant, in favour of the burgh of Lauder, is general; but immemorial possession proves the toll in question to have been granted, and ascertains its extent.

' THE LORDS found the burgh of Lauder has right to continue the possession of levying the several tolls and customs mentioned in the act and rates of the said burgh, dated 30th September 1703; and found the letters orderly proceeded, as to the customs enumerated in the said act: But found, That the burgh has no right to exact any toll or custom on coal or lime passing through the said town and territories, in carts, on horse-back, or otherwise.'

Reporter, *Prestongrange.* Act. *Sir D. Dalrymple, J. Grant, A. Lockhart.* Alt. *W. Stewart;*
A. Pringle, D. Rutherford. Clerk, *Forbes.*

Dalrymple. *Fol. Dic. v. 3. p. 105. Fac. Col. No. 116. p. 173.*

N. B. The reason of the last part of the interlocutor was, That as to these particulars, possession was not proved.

1762. June 14.

JAMES EARL of MURRAY, and OTHERS, Justices of Peace in the county of Fife, with DAVID GILCHRIST, and OTHERS, Burgesses in Kinghorn, against The MAGISTRATES and TOWN-COUNCIL of KINGHORN.

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The magistrates of a burgh found to have no power to oblige persons plying at a ferry belonging to them, to enter burgesses; or to compel those who do not enter burgesses, to desist from plying at that ferry.

THE Magistrates of Kinghorn appointed the following regulations: *1mo*, That each person passing the ferry upon a Sunday should pay half-a-crown over and above the ordinary freight. *2do*, That no person within the burgh should let horses to hire without being entered burghess, and paying L. 50 Scots; and that no burgesses should let horses without allowance of the postmaster. *3tio*, That all persons who let horses or chaises within the town, or those who being casually there took a retour hire, should pay to the town 5 *per cent.* in name of post-ship. *4to*, That each ton of wine landed at Kinghorn from the passage-boats should pay five shillings of shore-dues to the town. And, *5to*, That no person should act as a boatman till he is admitted a burghess.

An action was soon thereafter brought, at the instance of the Justices of the Peace of the county of Fife, and several of the burgesses, wherein they concluded, That the magistrates had no jurisdiction to make any acts or regulations concerning the management of the ferry, and that the regulations above-mentioned should be reduced.

With regard to the general conclusion, the pursuers *insisted*, That all matters of public police, such as ferries over navigable rivers, the management and reparation of the highways, &c. were committed, by several statutes, to the care

of the Justices of the Peace ; and that their powers were more particularly confirmed by the act 1669, cap. 16.

The defenders, on the other hand, *contended*, That they were authorised by their charters to make regulations concerning the management of the ferry : That, though their most ancient title-deeds were unhappily destroyed, yet they were still possessed of a charter in 1611, ratified by Parliament in 1633, by which their ancient charters, granted as far back as the time of King Alexander and King David, were renewed and confirmed : That, by this charter, the King granted, ‘ To the magistrates and town-council of Kinghorn, the whole territory of that burgh, with the pertinents thereto belonging, as also the port and harbour thereof, with the customs, anchorages, and all other duties and casualties whatever belonging to any free port or station ; as also the port and harbour called Pettycurre, with the customs and anchorages, &c. with power to the said magistrates, and their successors, of making officers within the said burgh, for the government and administration thereof, and of making laws within the liberties of the said burgh, for the preservation of peace and order, and with all other privileges and immunities competent to any other royal burgh :’ That the attempt now made upon the part of the Justices of the Peace was a palpable encroachment upon the jurisdiction of the magistrates, as established by the above charter : That the powers of the justices, however ample in matters of public police, were expressly limited to the regulation of such ferries alone as lie within the shires over which they are appointed ; and that the legislature never intended to give them authority over ferries situated within the liberties of royal burghs : That the jurisdiction of the magistrates of a royal burgh was as extensive within its own liberties, in matters of public police, as the jurisdiction of the justices over the rest of the county : That the two jurisdictions were quite distinct and independent of each other ; and that the town-council of Kinghorn had accordingly been in the immemorial use of making regulations with regard to the ferry.

To these arguments it was *answered* by the pursuers, That neither the charters, nor the immemorial usage founded on, could confer or confirm the privileges contended for by the magistrates : That the grant of a free port and harbour, contained in their charters, respected only the profits and emoluments arising from vessels coming into and going out of such harbour ; but that it was a mistake to imagine that the property of the harbour was conveyed by these words, or an exclusive jurisdiction established : That the authority of the justices of the peace is equally ample and extensive, in every thing concerning the public police of the country, within the liberties of a royal burgh, as it is within any other part of the county : That the magistrates are not public officers, in the true sense of these words, as their powers are solely confined to the administration of those private affairs which properly pertain to, and are connected with the burgh over which they preside : That their jurisdiction is exclusive of

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all other jurisdictions, concerning every thing by which the interest of the burgh is immediately affected ; but that, in other matters, such as a ferry, which is calculated for the conveniency and accommodation of all the lieges without distinction, a burgh, within which it may lie, has no more immediate concern than another which may be at several miles distance : That a ferry was entirely *juris publici*, the inspection and regulation of which belongs solely to the public officers of police : That the justices of peace were these officers ; and that the grant of a free port and harbour could never take the administration of an affair of such public concern out of their hands, and put it under the direction of those who were only possessed of a limited right to the profits and emoluments arising therefrom, and who could never be regarded as the legal administrators of the peace and order of the county.

With regard to the duties and taxations imposed by the town-council, the magistrates *contended*, That nothing more had been done than what was usual in all the burghs within Scotland : That the insignificant duties imposed upon the inhabitants, to be expended for behoof of the community, were justifiable by their rights ; and that they had been in the uniform practice of imposing what duties were thought expedient from time immemorial.

The pursuers, on the other hand, *contended*, That these duties were illegal and oppressive : That the town's charter from the crown, so far from bestowing a sanction upon such impositions, had expressly confined their right to the profits and emoluments arising from the grant of a free harbour : That the immemorial usage pleaded in bar of the reduction could be of no avail, as prescription can have no effect without a fundamental title on which it can proceed : That the Court had invariably found every exaction illegal which was unsupported by a title, and that usage, for the longest period of time, could never authorise such extortions ; as was lately determined in a case between the Barbers of Edinburgh and those of the Canongate, who had submitted to pay to the others a certain proportion of their entry-money, for a licence to practise within their own liberties. No 75. p. 1954.

THE LORDS found, That the regulation of the ferry belonged properly to the justices of peace : And also reduced the whole duties and taxations complained of, except a small duty of eight pence per ton upon wine imported at the harbour of Kinghorn, which of late had been increased to five shillings per ton : And likewise reduced the regulation with respect to burgesses-inhabitants only plying at the ferry, and letting chaises and horses. See JURISDICTION.—Justice of Peace.

Act. Lockhart, Rae.

Alt. Millar, Garden.

A. Wight.

Fol. Dic. v. 3. p. 101. Fac. Col. No 90. p. 199.