

1772. December 3.

THOMAS SCOT and ANDREW MUGGERLAND, as representing the Incorporation of Wrights, Coopers, &c. of Canongate, *against* ALEXANDER DICKIESON Glazier, and JOHN BONNAR and JAMES CUMMING Painters in Edinburgh.

THE corporation of Wrights, Coopers, &c. in Canongate, in the year 1770, brought an action of declarator against Dickieson, Bonnar, and Cumming, and some other individuals, and also against the corporation of wrights and masons, and the magistrates of the city of Edinburgh, concluding, to have their exclusive rights and privileges, within certain limits, declared, and to be continued in the possession thereof, conformably to their seal of cause, and ratification and confirmation thereof, libelled; and consequent use and wont: As also, to have it declared, that the defenders Dickieson, Bonnar, and Cumming, and others particularly named, who are unfreemen, have done wrong in presuming to use and exerce any of their trades or craits within the foresaid bounds; and to have the whole defenders ordained to desist therefrom in time coming.

In this action, neither the corporation of wrights and masons in Edinburgh, nor the magistrates of Edinburgh, did appear; but Dickieson, Bonnar, and Cumming, stated themselves as defenders. In the course of the procedure before the Lord Ordinary, it was set forth, that, so far back as the year 1767, the pursuers in the present action had brought a process before the Sheriff of Edinburgh against the defender Alexander Dickieson, concluding for L. 50 Sterling of damages, and a fine of L. 10, on account of his working within the liberties of the Canongate; and also concluding, that he should be prohibited from working at his trade there in all time coming: That, in this action, a proof was taken, and, on the 26th October 1768, the Sheriff pronounced this interlocutor: 'Finds it proven, that the glaziers of Edinburgh have, for many years past, wrought in Canongate, though they have been sometimes challenged for so doing; and that the defender in this process has only done what he saw practised by others of the trade; therefore assoilzies him from this process, reserving to the pursuers to declare their exclusive privileges as they shall be advised.' These proceedings before the Sheriff were produced by the pursuers in this process; and they likewise exhibited two several condescendences as to their exclusive possession, and barring unfreemen, upon the defenders denying the same.

Upon the whole, the LORD ORDINARY pronounced the following interlocutor: 'Finds, that the wrights, coopers, &c. of Canongate, are, by virtue of their seal of cause, charter, and other writs produced for them, a proper and regular incorporation; and, as such, have been in use, many years beyond the time of the long prescription, to act as a corporation, by electing officers, having a common box for the support of their poor, by admitting members, barring unfreemen, and exercising other acts as a body corporate: And that, on the other hand, the work done by the defenders within the liberties of the Canongate,

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Declarator of the exclusive privileges of a corporation sustained, notwithstanding of the acts 1540, c. 111. and 1607, c. 4. The encroachment of members of another corporation, having like privileges, found illegal.

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were no other than encroachments, which the pursuers were entitled to stop, and generally did stop when discovered : Therefore finds, that the pursuers, and the other members and freemen of their incorporation, present and to come, have the only right and privilege to exercise their several arts and trades within the burgh of Canongate, and liberties thereof; and to debar all unfreemen from exercising any of the said arts within the bounds foresaid. And finds, that the defenders Alexander Dickieson, &c. did wrong in presuming to exercise their trade within the said bounds; and ordains them to desist and cease from encroaching upon the pursuers rights and privileges within the said burgh of Canongate, and liberties thereof, in all time coming; and decerns and declares accordingly.'

Pleaded in a reclaiming petition : This judgment falls to be altered, as well upon the public law, as upon the particular circumstances in which these pursuers stand.

Exclusive privileges of incorporations of any kind, as being contrary to liberty, and inconsistent with the true ideas of commerce and public police, have, of later times, been by no means favourites of the law, which hath taken every opportunity of abridging and restraining them, and in several cases hath cut them off altogether, though sanctified by the most inveterate custom.

In particular, the evil consequences arising from exclusive privileges given to those employed in rearing and preparing buildings, whether of a public or a private nature, seem to have been early felt, and to have very soon attracted the attention of the legislature, insomuch that, so far back as the year 1540, a statute was made to remove such exclusive privileges altogether; and, consequently, to reduce incorporations of wrights, masons, glaziers, &c. to the simple privileges inherent in every body corporate, of holding public funds, having a *persona standi in judicio*, a power to elect officers, &c. but by no means to give the individual members, in the right of their admission into the body-corporate, any title to debar those that were not members from using their trade, when and where they pleased. The statute is chap. 111. of the 7th parliament of James V. This statute was enforced by another in the reign of James VI. viz. 1607, c. 4.

Under the authority of these statutes, so clear and explicit, and, which, as being statutes relative to public police, cannot run into desuetude, the defenders, one of whom is a glazier, and the other two are house-painters, to which professions the statutes are undoubtedly meant to extend, apprehend they are secure, and might here rest their defence, namely, that the pursuers are barred by the statute 1540 and 1607, from insisting in this process of declarator, which relates to their exclusive privileges alone, however they may be entitled to exercise the rights of a corporation, in electing office-bearers, being represented in council, having a common fund, and a right to pursue and to defend. But, *2do*, the situation of the pursuers is extremely particular. The seal of cause, under which the pursuers claim a right, and of which no more than a notorial copy they have to produce, bears date 6th April 1612, but five years after the date

of the act of parliament last recited, and when no doubts could be entertained of its being a valid, a binding, and subsisting law. It is granted by William Bellanden, Lord and Baron of the regality and barony of Broughton, with consent of Dame Elizabeth Kerr, Lady Broughton, his mother, and tutor testamentar, for her interest. Of this seal of cause the corporation appear to have obtained a charter of confirmation under the Great Seal in 1627; and the seal of cause and charter were confirmed by one of the rescinded acts of parliament 1641, against which the masons, wrights, &c. of Edinburgh entered their protestation.

The seal of cause, one would think, was drawn up with the view to make it as contradictory to the statutes as possible, though it bears so very recent a date after the latter of them; for it brings together into one corporation, vested with exclusive privileges, almost every artificer that could be any how employed in building or repairing a house, from the mason and slater to the wright and painter. It is no wonder then, that it was not tamely submitted to by the inhabitants of the very extensive district, over which it was meant to extend. It appears, accordingly, that, towards the end of the last century, this corporation had been pushing the claim to exclusive privileges pretty far against the inhabitants of North Leith, Canonmills, &c. Those people, however, were by no means inclined to submit to a claim so prejudicial to their interest; accordingly, they brought a process before the Court against the several corporations of Canongate, concluding reduction of the pretended seal of cause, and a declarator of immunity. On the other hand, the corporation brought a counter-process against these inhabitants, and several tradesmen within the barony, said to have encroached on their privileges, concluding an ample declarator of those privileges within the whole bounds expressed in the seal of cause. These processes appear to have been litigiously debated by both parties; and at length terminated in a decree of this Court, passed in 1694, which is a decree cutting down the seal of cause in question.

And, *3tio*, as to the possession of exclusive privileges said to have been had by the pursuers, past the years of prescription, the proof which has been attempted on the part of the pursuers, so far from aiding their cause, really turns out against them, and shows that they have by no means been in the possession of the exclusive privileges they pretend.

Answered: The defenders set out with exclaiming against the exclusive privileges of incorporations, as inconsistent with the true ideas of commerce and public police, and which were meant to be remedied by the stat. of 1540, entitled, Anent the conduction of craftsmen, confirmed by an after stat. in 1607. But, as these statutes have long gone into disuse, and have not the most distant connection with the case in hand, it has been long the object of speculation, and remains at this day as unsettled as it was at the beginning, whether these exclusive privileges are beneficial or hurtful to society in general? If they are hurtful to society, the legislature can give relief; but, while the law stands as it

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does, they are entitled to the protection of that law, against every invasion of their right.

But, be that as it will, an objection of this kind comes with a bad grace from these defenders, who are so many members of the incorporated trades of in Edinburgh, endowed with the like exclusive privileges; and it will puzzle the defenders to assign any good reason, why these exclusive privileges should be more obnoxious in the one case than in the other.

The statutes of 1540 and 1607 have been repeatedly referred to in every question of this kind, and uniformly disregarded, as not only having gone into disuse, but as nowise applicable to the case.

2do, A denial of the possession of these exclusive privileges by the incorporations of Canongate, would carry a more plausible appearance, were the question now, whether these incorporations had acquired those exclusive privileges by immemorial possession, so as to give them a prescriptive right? But that is plainly not the case: They had their original seal of cause from the abbots of Holyroodhouse some hundreds of years ago; they had a renewal of it after the reformation from the Lords of Ereccion, ratified and confirmed by a charter from the Sovereign, with a *novodamus*, and the whole confirmed by an act of parliament. Under these titles, they have possessed their exclusive privileges, without challenge, down to this day; so that the defenders might, with equal justice, dispute their existence as a corporation.

How far these privileges might be lost by the negative prescription, is not *hujus loci*, as no such objection is moved; but there is the less occasion to be solicitous upon this point, as, from the depositions of the witnesses taken before the Sheriff, there is the clearest and most direct evidence, that, however particular offenders might escape observation, or be connived at, they were, for the most part, not only challenged, but were obliged to enter freemen with the incorporations of the Canongate, upon payment of the accustomed dues.

3tio, The defence, founded upon the decree of this Court in the 1694, if rightly understood, amounts to this, that, by the aforesaid decree, the freemen of Canongate are, in effect, found to be no corporation whatever; or, which is equivalent, that they have no exclusive privileges. Where such a corporation is to be found in any of the burghs of royalty, regality, or barony, in Scotland, the pursuers are yet to learn; and, when the decree 1694 is fairly explained, so far from availing the defenders, in the smallest degree, it is the strongest piece of evidence against them.

As the magistrates and deacons of crafts in Edinburgh did concur with the incorporations of the Canongate in the declarator at their instance, and were joint defenders in the other process, they virtually not only acknowledged the incorporations of the Canongate to have a legal establishment, and as thereby, *inter alia*, entitled to debar unfreemen from practising their trades within the burgh of Canongate, and its liberties, but did not concur in maintaining that these exclusive privileges extended over the property-lands of the several heritors, as

originally parts of the regality of Broughton; and, as neither the magistrates nor council, nor the deacons of the incorporations of Edinburgh, do take part with, or give countenance to the defence that is now maintained on behalf of the present defenders, however well disposed, upon all other occasions, to extend their authority and privileges over the Canongate, it cannot but appear strange that these defenders, as so many individuals, should be so hardy as to maintain this litigation in their own name.

The result of the aforesaid mutual processes was a judgment, 8th February 1694, declaring the privileges libelled conform to their gifts and seal of cause, in favour of the incorporations of the Canongate, and liberties thereof; and declaring the immunity libelled in favour of the inhabitants of the regality of Broughton, and the country included therein, and that they are free of any servitude to the trades of the burgh of the Canongate.

It were improper, on this occasion, to enter on the question, whether the immunity ascertained by these decrees were just or unjust? but, as the matter therein disputed was, whether the exclusive privileges granted to the incorporations of the Canongate did extend over the lands of those heritors, which, by a contract in 1637, and charter and infestment thereon, had been separated from the regality of the Canongate, and erected into a separate regality in favour of Herriot's Hospital; and, as this clearly imported an acknowledgment that the incorporations of the Canongate did retain their exclusive privileges within the burgh of Canongate, and its liberties, it is truly incomprehensible what argument can from thence arise, to infer that the freemen of the incorporations of Edinburgh are entitled to exercise their callings within the liberty of the Canongate.

Observed on the Bench: This is a question alone between two incorporations; and the incorporation of Canongate has just as good a right as that of Edinburgh.

'THE LORDS adhered.'

Act. A. Lockhart.

Alt. Crosbie.

Clerk, Campbell.

Fol. Dic. v. 3. p. 108. Fac. Col. No 37. p. 96.

1775. *January 18.*

ALEXANDER OLYPHANT and Company, Wine-Merchants in Ayr, *against* The
MAGISTRATES and TOWN COUNCIL of AYR.

THIS being a question relative to the Town of Ayr's right to exact certain duties upon wine passing out of the harbour of Ayr northwards, under the denomination of *bridge custom*, which was challenged by an action of declarator at the instance of Alexander Olyphant and Company, the Magistrates, in defence, stated their several charters from the Crown, from William the Lion,

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Immemorial practice in a burgh, of levying particular duties, having a preceding title in writing to tolls and customs in general, found to be a sufficient ground for supporting the exaction.