

1775. February 22.

BOOG and THOMSON, proprietors and possessors of the Grange Brewery, *against* The MAGISTRATES and TOWN-COUNCIL of Burntisland, and WILLIAM BUTLER and JAMES SMITH, tacksmen of the small customs of said burgh.

AT Martinmas 1773, the petty customs of the town of Burntisland being exposed to roup for a year, the defenders, Butler and Smith, were preferred there to as the highest offerers, and got delivered to them a printed copy of a table for their rule, warrant, and authority of levying the duties therein contained. This table had been drawn up by a committee of the magistrates and council, appointed in the year 1769, with instructions to make out new tables of the shore-dues and customs of the burgh: 'And, in regard that from time to time heretofore, there had been sundry articles erased from their tables, and exeemed from payment of these duties, and that the like duties on other articles had been neglected to be levied, the committee were authorised to make out the new tables as they judged most proper.' And the new tables so made out were approved of by an act of council, which was passed in June 1770.

One of the articles contained in said table, states one farthing, or three pennies Scots, payable by burgesses for each 20 pint cask of ale or beer imported into the burgh, or exported from the same.

Messrs Boog and Thomson were proprietors of the Grange brewery in the vicinity of the town of Burntisland; and, from its erection in the year 1767, were in the use of importing ale into the town without the magistrates claiming any right to exact a duty on that account, other than what they were entitled to by the act of Parliament imposing a duty of two pennies on the pint.

Matters were in this situation when, in the 1773, Butler and Smith, tacksmen of the customs, seized a horse and cart loaded with ale when on the public high-way leading from this brewery into the burgh, and prevented the servant from proceeding with it, unless he would pay a certain sum in name of custom: Whereon a complaint was entered to the justices of peace, who allowed the defenders a proof of their having been in use to exact the duty demanded. It was acknowledged on the part of the tacksmen, that this custom had not formerly been in use to be exacted; and the justices having allowed a proof of the complaint, upon advising the same, 'fined the defenders in L. 4 Scots, and decerned them in L. 8 Scots of expences; and granted warrant to imprison them in sure ward in the county of Fife, until payment of the fine.'

Of this sentence a suspension was obtained in name of the Tacksmen, and, in discussing thereof, the magistrates of Burntisland having been also called as parties for their interest, the cause divided into two branches, viz. the original complaint against the tacksmen for an alleged riot, or wrong, committed by them in attempting to levy this new custom. *2dly*, The power and authority of the magistrates to impose it.

No 103.

The magistrates and town-council have no power to exact any new duty or customs.

No 103.

As to the 1st, the defence of the tacksmen was rested upon this proposition, that this branch of the town's revenue, conformably to a table thereof, being exposed to public roup, and to which they were preferred as highest offerers, they were *in bona fide* to attempt levying the same in the usual and accustomed manner, viz. by stopping the horse and cart till payment should be made thereof; that, in so doing, they were guilty of no violence or wrong which could subject them either to a fine or expences.

And, 2dly, With regard to the question of right, on the part of the magistrates,

It was *contended*: That, as there is not one royal burgh in Scotland to which certain small duties were not payable upon goods imported into the town, and which, from the smallness of the duties, pass under the general name of petty customs, it is equally certain that neither the species of goods, nor the quantum of the customs exigible upon these, are ascertained by the charters of any of the royal burghs, though the word *customis*, and other synonymous words, are to be found in most of these charters, importing a general right to the petty customs, but without specifying particulars; the ascertainment of which, therefore, must have been left to the discretion of the magistrates and town-counsellors, as should be deemed most conducive to the state and condition of the several burghs. It is implied in the nature of things, that these petty customs must be variable and fluctuating. And, as the general powers of the magistrates and council to regulate these petty customs cannot be doubted, there is reason to believe it will be found to be the universal practice in the magistrates and council of the several burghs to ascertain, from time to time, a table of these petty customs, whether imposed upon the goods themselves of different species, or by the cartful or horse-load of goods in general; and when imposed upon the goods themselves, striking off from the table such as had gone into disuse, and adding others as come in their place, where there is *par ratio* that the same duties should be payable upon the one species as upon the other.

*Answered* upon the question respecting the point of right: It is a principle fixed in the very basis of our constitution, that no tax or imposition of whatever name, nature, or extent, can be imposed without the authority of the legislature; not even the royal authority is sufficient to impose a temporary tax, of the mildest nature, as was lately determined in the case of Campbell from the Grenades. *See JURISDICTION.*

It is well known, that particular customs are specified in the charters of many of the burghs; or, at least, that they have particular grants, empowering them to levy certain customs; and where the charters are general, with only a clause, *cum customis*, this has been uniformly understood to imply only a right to levy such customs as had been in use always to have been collected; not to confer a power of imposing other customs and duties at discretion: And if the chargers are well founded in this position, it affords a conclusive answer to the whole of the magistrates' argument respecting the expediency of imposing a custom on

any new article of commerce, which may come in place of other articles formerly in request which had been in use to pay custom.

And, with respect to the practice of burghs, it is believed the Court has uniformly and repeatedly found, so often as the question has occurred, that they have no power to impose any new duty or custom whatever: Thus, very lately, the Court found the town of Edinburgh had no title to exact an impost on cyder or perry, as these liquors were not mentioned in their grants, and no such duty had been long in use of being levied, No 69. p. 1940.

The Court were clearly of opinion, that the exaction of this new duty was illegal on the part of the magistrates. Neither did the *bona fides* alleged by the tacksmen appear to be well founded from the circumstances of the case, so as to set aside the Justices' sentence, however they might be entitled to relief from their authors, the magistrates: And, therefore, judgment was pronounced as follows:

' Find the letters orderly proceeded against William Butler and James Smith for the two sums of L. 4 and L. 8, both Scots money, charged for; but find the magistrates of Burntisland obliged to relieve them thereof: And decern against all the parties for payment; and find the magistrates liable to the chargers in expences: And suspend the letters *simpliciter* as to the imprisonment of the suspenders till payment.'

Act. *Al. Bruce.*

Alt. *Dean of Faculty.*

Clerk, *Gibson.*

*Fol. Dic. v. 3. p. 102. Fac. Col. No 163 p. 48.*

1775. July 13.

ALEXANDER STEWART *against* JOHN ISAT.

No 104.

ISAT, a brewer in Gorbals of Glasgow, being sued before the Justices of Peace, at the instance of Stewart, collector of the impost on bear and ale in Glasgow, as having contracted an arrear of said impost, which also extended over the Gorbals, he brought the cause before this Court by advocacy, alleging the Justices were incompetent, and pleading several defences upon the merits; in particular, that he was charged with more than the magistrates had been in use to charge others in the same situation with himself. He averred, that the magistrates had not been in the use of demanding from any brewer, liable in the payment of the duties, more than 10d. *per* barrel; that he had been partially singled out by the magistrates, and charged with 1s. 1d. *per* barrel, being 3d more than had ever been demanded from any other person; and he maintained, that this was one of those cases wherein the supreme Court ought to interpose, and give him relief.

*Answered* on the part of the collector: That, as it was not alleged, that the barrels or firkins of ale, with which the defender was charged, were over-numbered, or that the arrear with which he was charged, exceeded the duty laid on

Magistrates of a burgh, having power by special grant to levy a duty on beer and ale, may not charge it unequally upon the persons liable in such duty, under the pretence, that, though an ease be given to some as to the duty in question, yet a general parity is preserved, in respect of their subjecting themselves to another tax.