APPENDIX.

PART I.

COMMUNITY.

1800. *January* 28.

ANDREW WAUCHOPE and Others, *against* The MAGISTRATES of Canongate.

No. 1.

The Magistrates of Canongate found entitled to levy customs at the Water Gate, according to long usage, though they were higher than those allowed by the act 1593, introducing the right of levying duties there; but additional duties laid on by the Magistrates *de recenti* were set aside.

BY act of Parliament 1593, the Magistrates of Canongate were authorized for three years, and afterwards during his Majesty's pleasure, to levy two pennies Scots on each cart-load, and one penny on each horse-load, coming within the Water Gate, to be sold in the market, for the purpose of repairing the street of Canongate, and roads there mentioned. By letter from James VI. in 1596, the right was continued for five years; and it was made perpetual by act of Privy Council in 1603.

The Magistrates of Canongate have been accustomed to let the duties leviable at the Water Gate, and to publish tables of the duties.

By the table in 1723, the earliest extant, the duties were materially different from those sanctioned by the act 1593. The-cart load of some commodities, whether coming out or in, was rated at eight, and on others at six pennies. The duty on the horse-load varied from eight to two pennies; a rate was likewise laid on burdens, and on live animals of certain descriptions.

By the next table in 1734, duties were laid on various articles not mentioned in the former.

The tables in 1748, 1751, 1768, 1792, were almost entirely the same with that in 1734.

But in 1795 a table was published by the Magistrates, raising the duties considerably in most particulars, introducing a few new articles, and in all cases rating the duty, so as to be payable in Sterling money.

Andrew Wauchope, Esq. of Niddry, for himself, and as convener of the trustees of the turnpike district to the east, with concourse of the procurator-fis-

No. 1. cal of the county, complained to the Sheriff, craving that the Magistrates should be ordained to produce the grants on which their right of exaction was founded, and prohibited from demanding more than they authorised.

The act 1593, and tables above mentioned, were produced by them. The Sheriff found, that the table of "customs 1796 (1795) is totally discon- "form to the printed table in 1792; and that neither of them are conform to "the act of Parliament 1593, and grant of the Privy Seal 1603;" and prohibited the Magistrates from exacting other duties than those contained in said act of Parliament, and grant of Privy Seal.

The Magistrates complained by advocation; and a declarator was raised by the other party, concluding that the duty should be restricted, in terms of the Sheriff's interlocutor.

The pursuers

Pleaded: It is contrary to law to levy any duty or tax, without consent of Parliament. This was declared by act of Parliament 1587, C. 54; the only exception being in favour of duties levied for time immemorial prior to that period. See also 1661, C. 57.

When, indeed, a grant is produced, authorising something to be exacted, but without defining the extent of it, this may be regulated by usage; or where no title at all is produced, but the usage of exaction has been immemorial and uniform, a legal title, though not now extant, will be presumed. But where, as in the present case, the right depends solely upon a statute, precisely ascertaining the amount of the duty, (and there is no evidence of any after grant,) it is impossible to connect any deviation from it, with a presumption of legal title; and a usage contrary to the statute cannot be the foundation of prescription, as being contrary to law and the title of the party, the act 1593 having a similar effect in preventing prescription, with a bounding charter.

This would have held, although the possession of the Magistrates had been uniform and uninterrupted; but the variation of the tables from each other, shews, that the claims of the Magistrates are founded in usurpation, and could only be justified on the supposition that they have a discretionary power of levying what duties they think proper, which will not be pretended.

Even this illegal possession was interrupted by a complaint similar to the present, raised by Gardiner and others in 1758.

Answered: The possession from 1723 to 1795 has been uniform. The alterations in the table 1734 are to be considered rather as regulations to prevent evasions of the duty, than as additions then made to it. From the proof in Gardiner's process, (which was deserted from the proof turning out unfavourably to the complainers,) it appeared that the same duties had been levied from a much earlier period than 1723; and these duties being quite different from those authorised by the act 1593, that act is now in desuetude, and the possession must be ascribed to some later grant, authorizing it.

Indeed, in the index to the unprinted acts 1603, there is "an act in favour "of the burgh of Canongate," which is not entered in the records of Parliament, and is not now extant, probably having been destroyed by the rebels, when they had possession of the town-house of Canongate in 1745. But from the possession from about the date of that statute, it in all probability related to this subject. No. 1.

The act 1593 being therefore out of the question, the possession justifies the exaction, by presuming a title upon the pursuers' own principles; for it is easier to presume an extension of a grant that an original one. According to the pursuers' doctrine, it would be better for a burgh to lose its whole titles, than preserve only some of its more ancient ones. Besides, by the municipal law of Scotland, by which, and not by the principles of the British constitution, this question is to be decided, possession alone is sufficient to justify the exaction of petty customs of this sort; Dict. *voce* PRESCRIPTION, Div. 3. Sec. 11; 18th Feb. 1727, Magistrates of Canongate against Keepers of Hackney Coaches, No. 154. p. 10908; 15th November 1754, Magistrates of Lauder against Brown, No. 101. p. 1987; 1st March 1769, Lord Kennet against Lady Frances Erskine, No. 77. p. 10781; 18th January 1775, Oliphant and Company against Magistrates of Ayr, No. 87. p. 1971.

The act 1587, C. 54. which declares exactions illegal without consent of Parliament, expressly excepts those which have been exacted from time immemorial, to which Mackenzie holds possession for forty years to be equivalent, without making any distinction as to its commencement being prior or posterior to the act of Parliament.

The duties exacted prior to 1795, are, therefore, justified by the presumption of a Parliamentary grant, and by the possession which has followed. Those in 1795 are so, by the circumstances of the case, and decisions of the Court in similar instances.

The coin in which the duty was formerly levied is now quite out of circulation; and it therefore became necessary to make a small addition to the duty, in order to avoid fractions, and make it capable of being levied. The introduction of waggons, and an enlarged size of modern carriages, likewise justified a proportionable increase of the duties. In such cases, Magistrates have a discretionary power, subject, no doubt, to controul; and it would be absurd to make an application to Parliament necessary for every such trifle; 10th July 1712, Town of Edinburgh against Country Brewers, APPENDIX, PART II. *voce* COMMUNITY; 29th June 1786, Fergusson and Others against Magistrates of Glasgow, No. 108. p. 1999.

Replied: When a change of circumstances makes an existing law inconvenient or inexplicable, the Legislature only can give redress.

The Lord Ordinary reported the cause on informations.

The Court were much divided in opinion.

On the one hand, it was held, that there was no evidence of any Parliamentary grant, except that of 1593, and that no usage could justify any deviation from it. On the other, it was thought, that, so far as the claims of the Magi-

No. 1. strates had been sanctioned by usage, they ought to be supported, both from the presumption of another grant not now extant, and from the acquiescence of the country; which brought the case to the same point as if the grant had been of *petty customs* in general terms, without defining their extent.

The Lords (6th December 1798) found, "That the defenders had no right "to make additions, in the table 1795, to the customs that had formerly been "in use to be levied at the Water Gate: Found, That the defenders have right "to levy the customs contained in one or other of the tables prior to 1795; "and remitted to the Lord Ordinary to hear parties, which of the said tables "shall be the rule, and under what modification or alteration such duties on "the table to be adopted shall be levied in future," &c.

The defenders acquiesced.

On advising a petition for the pursuers, with answers,

The Lords (15th June 1799) "altered the interlocutor reclaimed against, "and found, That the Magistrates of Canongate, or persons under their autho-"rity, are not entitled to exact other duties than those contained in the act of "Parliament 1593 and grant 1603."

But the Magistrates reclaimed, and the Court returned to their first interlocutor.

Lord Ordinary, *Glenlee*. Act. *Lord-Advocate Dundas, D. Cathcart*.
Alt. *Hope, Cranstoun*. Clerk, *Home*.

D. D. *Fac. Coll. No.* 161. *p.* 359.

*** It was found in the case RAIT and Others against MAGISTRATES of ABERDEEN, 21st November 1804, (APPENDIX, PART I. *voce* JURISDICTION,) that Magistrates have no jurisdiction entitling them to extend petty customs beyond use and wont.