

No 61. therefore prohibited and discharged the said George Menzies from exercising said trade, until he purchase his freedom of the town and incorporation.'

Lord Drummore awarded suspension of this judgment.

In a petition it was *pleaded*, That M'Duff's name on the sign-board, and the indenture entered into, were a device to protect Menzies; and a variety of circumstances were adduced which evinced this: That besides, it was inconsistent with the nature of the duties of a burghess, to be non-resident; therefore, while non-resident, he could enjoy none of the privileges. Acts of the town council were quoted, particularly one 16th March 1660, to show that burghesses non-resident forfeited their privileges.

In *answer*, it was *argued*, That the sentence of the Dean of Guild, which had been suspended, had no respect to the alleged device; and that the acts of Council, founded in contracted ideas of commerce, were in desuetude: That M'Duff's absence was merely temporary.

In the course of the proceedings, M'Duff was removed by the Board of Customs from Leith, to a distance in the north, whence it was evidently out of his power to perform the burgh services of watching, warding, &c.

THE COURT altered the Lord Ordinary's interlocutor; and found the letters orderly proceeded.

For the Barbers, *Jas. Ferguson.*

For M'Duff, *Pat. Haldane.*

*Fol. Dic. v. 1. p. 118. Session Papers in Advocates' Library.*

\* \* \* Lord Kilkerran, p. 99. observes this last case thus: 'Found, that a non-resident burghess could not keep a shop, or carry on a trade by apprentices, or others under the name of apprentices.'

### No 62.

Found, that a burghess, though a craftsman in one of the incorporated trades of a burgh, might, without renouncing his trade, be a vintner.

1743. *January 26.*

JAMES HOG, late Treasurer of the Guildry of Dunfermline, charger, *against*  
FLOCKHART and BUNTEIN.

THE suspender, who was a craftsman-burghess of Dunfermline, being fined by the dean of guild for selling wine in that town, and prohibiting him to do so for the future, suspended the decret: and the question betwixt the parties was, Whether the craftsmen-burghesses of Dunfermline might lawfully sell wine, and other foreign merchandise, within that burgh, without renouncing their craft?

For the charger it was *urged*, That the freemen of each royal burgh were divided into two classes, the guildry and craftsmen, who had each privileges peculiar to themselves. With respect to the first, their exclusive privileges were settled by the 12th act 1466, James III. whereby it was ordained, 'That nae man of craft use merchandise by himself, nor sail in merchandise neither be himself, nor his factors, nor his servants, but gif he have leave, and re-

'nounce his craft but colour or dissimulation.' Which is likewise ordained to be put into execution by the act 107, 1487. See likewise Hope's MSS. Town of Aberdeen, No 44. p. 1902.; Lord Fountainhall, 8th January 1697, Guildry of Stirling, No 57. p. 1916.

And by the decret-arbitral of the general convention of burghs held at Dunfermline 1618, proceeding on a submission betwixt the merchants and trades of that burgh to the convention, an absolute distinction is preserved betwixt the guildry and craftsmen; so that one could not enjoy the privileges of a guild-brother, and of a craftsman, at one and the same time.

*Pleaded* for the suspender, That, by a clause in the said decret-arbitral, 'It was declared leisom to the craftsmen, being only burgesses of the said burgh, to sell and traffic with all Scots wares, &c. providing always, they do not trade with foreign merchandise, nor transport the said Scots wares out of the country.' In virtue of which clause the trades have always dealt in retail of wares of all sorts, foreign and domestic, abstaining from the exportation of home goods, and importation of foreign merchandise. And, with respect to the act of James III. on which the claim of the guildry is founded, it was *answered*, That length of time could never alter the sense of a law; and if the words thereof bore a precise meaning in the 1466, the act behoved to be interpreted according to that meaning now. Though every retailer at present gets the name, improperly, of merchant, yet it was not so anciently, as is plain both from the Roman law and ours. See Horace, 24th Ode, book 3, and the act 67, 14th Parl. James II. from which statute it is plain, that *sailors* and the *estate of merchandise* were understood to be synonymous terms, and which is further explained by the acts preceding and following, whereby it is evident, that none was allowed to *sail in merchandise, or to use merchandise by themselves*, but 'freemen of burghs, not being craftsmen. And as an exception confirms the rule in cases not excepted; so the prohibition of craftsmen can extend no further than to the using of merchandise, and no man used merchandise in the sense of those laws, but those who by themselves or their factors dealt in export or import. And this likewise tends to explain the words in the decret-arbitral *foreign merchandise*, especially as it is there opposed to the exportation of home goods. How soon retailers came to be dignified with the name of merchants seems uncertain; but from the whole tenor of our law it is plain, that nothing passed under the name of merchandise as far down as 1579 but foreign trade.

THE LORDS found that the suspender, as a burghess, though a craftsman in any of the incorporated trades, may exercise the vocation of a vintner, by tapping and selling wines, and other liquors, for consumption in his own house; and therefore suspended the letters.

N. B. The above interlocutor was reclaimed against, but it does not appear from the Journal what deliverance was given thereon.

*Fol. Dic. v. 3. p. 105. G. Home, No 223. p. 366.*

No 62.

\* \* Kilkerran reports the same case :

THE treasurer of the guildry of Dunfermline having obtained a decree before the dean of guild unlawing Buntein and Flockhart in L. 12 Scots, on their being convicted of habitually selling wine in Dunfermline, when they were at the same time craftsmen of the burgh, and discharging them to use that trade in time coming ; in the suspension of that decree, the Lords, after having heard the case in presence, found, ' That the suspenders, being burgesses, may, although ' members of an incorporate trade, lawfully exercise the vocation of a vintner, ' by retailing wine or other liquors for consumption within their own houses ; ' and therefore suspended the letters.'

There are three sorts of *burgesses*, burgesses *in sua arte*, who are members of one or other of the corporations ; burgesses who are guild-brothers ; and a third sort, who are simply burgesses, and neither guild-brothers nor members of any corporation. Each of these are confined to their proper spheres.

A burgess admitted member of a corporation cannot exercise the business of another corporation ; and some carried this so far as to say, that a member of a particular corporation had no title to exercise any other sort of business, even such as one simply burgess might do. But the more general and just opinion was, that this lower sort of burgess-ship was comprehended in that of being burgess in a particular trade, and that therefore the member of a corporation might exercise any business that did not fall within the privileges of any other corporation : A member of the guildry cannot exercise the profession of any of the corporations, nor any member of a corporation deal in merchandise, by which was understood dealing in foreign commodities, even in retail.

But then, as to the point in issue, the vocation of a vintner, who only sells wine to be drank within his own house, was understood not to fall under the description of merchandise, more than the keeping of a cook's shop ; as in both there was, besides the sale of the liquor and eatables, the sale of the landlord's labour and service, of coal and candle, &c. on which consideration it was even thought that the guildry could not quarrel any person, although not a burgess at all of any sort, from exercising the vocation of a vintner, or setting up a cook's shop, more than they could restrain a person from taking up the business of letting lodgings, because not a burgess.

But as there was no occasion to give a judgment on that point, the interlocutor proceeded as above ; the Court at the same time being unanimous, that the suspenders could not retail for consumption out of their own houses, as what would be understood as using merchandise.

*Kilkerran*, (BURGH ROYAL.) No 3. p. 100.