

1761. July 30.

JAMES FERGUSON, MATTHEW BROWN, and Others, for the Incorporations of Kilmarnock, *against* The MAGISTRATES and TOWN COUNCIL, in behalf of the Community.

IN 1591, the village of Kilmarnock was erected into a burgh of barony in favour of the family of Kilmarnock, with power and privilege to the baron, of admitting burgesses; and from that family, the taylor, bonnet-makers, shoemakers, weavers, and glovers, obtained seals of cause, establishing them into incorporations, with the exclusive privilege of admitting their own members, and of carrying on their several crafts within the burgh.

In 1700, the government of the burgh by a magistracy was transferred to the community by a grant from the Earl of Kilmarnock, which contained the following clause: ' With power to the said magistrates and town council, present and to come, to make and create burgesses of said burgh of Kilmarnock, including and debarring all others from any merchandisings, trade, or mechanism, except those who shall receive burgess-tickets from them for that effect; and excepting likewise those who shall procure heritable feus of any part of the houses, yards, and incorporate acres of land, to be incorporated with the said town and incorporation of Kilmarnock; all which are hereby declared to be as free burgesses of said burgh, as those that receive burgess-tickets, in manner foresaid, for that effect; excepting likewise such particular trades and incorporations, in favour of whom our predecessors have formerly granted the said immunities and privileges above-mentioned.

James Ferguson and Matthew Brown, members of the incorporation of taylor, having set up shop in order to carry on merchandize, the treasurer of the burgh obtained a decret before the bailies, in 1758, prohibiting them, until they should be entered burgesses, and fining them in a small sum for the use of the burgh.

Of this decret a process of reduction was brought at the instance of the said James Ferguson and Matthew Brown, and the boxmasters of the five incorporations, containing a declaratory conclusion, that all the members of the incorporated crafts had right to carry on trade, merchandize, and traffick of all kinds within the burgh, without being entered burgesses by the magistrates and town council.

*Pleaded* for the pursuers: *imo*, Where a guildry is established, it is a necessary consequence of the seclusive privileges conferred upon it, that no person can deal in merchandize who is not admitted to the freedom of the guildry; these seclusive privileges constituting a proper freehold. But, where there is no guildry, trade, or merchandize, and more especially, the retailing the native commodities of this country, is the right and privilege of every British subject. Now, in the town of Kilmarnock there is no guildry; it must therefore follow, that each inhabitant is at liberty to deal in merchandize, as well as to follow e.

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A burgh of barony being erected, with power to the baron to admit burgesses; none of the members of the incorporated crafts, afterwards established in such burgh, are entitled to carry on merchandise within it, without being admitted burgesses.

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very other branch of business that is lawful, and does not encroach upon the seclusive privileges of any of the five incorporations. Let it be supposed, that any stranger should come to this burgh, and set up the trade of watch-making; would it be in the power of the magistrates to debar him from the exercise of his trade, until he should enter himself a burghess? It would not; because, in following out his employment as a watch-maker, no encroachment would be made upon the seclusive rights or privileges of any of the bodies corporate within the burgh; and, for the same reason, every person must be at liberty to carry on merchandize without being admitted burghess: It cannot therefore be maintained, that the power of admitting burghesses, granted by the charter of erection to the family of Kilmarnock, did necessarily imply a power of debarring the other inhabitants from the enjoyment and exercise of this, or any other of their natural rights and liberties.

*2do*, As the Earl had no such power himself, it neither was, nor could be conveyed to the magistrates by the grant 1700.

*3tio*, Supposing the grant to be available for this purpose, the incorporated trades are comprehended under the last-mentioned exception, which is equally broad as those in favour of entered burghesses and feuers.

*4th*, Part of the composition paid by the town of Kilmarnock to the royal burghs, for the communication of foreign trade, is levied upon the members of the incorporations; they are therefore entitled to the privilege of trade thereby acquired to the burgh in general.

*Pleaded* for the magistrates and town-council: *1mo*, The privilege of admitting burghesses granted by the original charter of erection, necessarily implies a power of debarring all others, but such as should be so admitted, from carrying on any craft, trade, or merchandise within the burgh; as otherwise this privilege must be altogether elusory, and without a meaning.

*2do*, This privilege or power was transferred to the magistrates and town-council by the grant 1700.

*3tio*, The exception in favour of the incorporations only saves and reserves to them, the immunities and privileges conferred upon them by the then Earl of Kilmarnock's predecessors, *i. e.* the exclusive exercise of their several mechanic arts established by their seals of cause; but by no means entitles them to carry on trade or merchandise without being admitted burghesses. This being the case, it can have no influence, that there is no guildry in Kilmarnock. Many royal burghs are in the same situation; and in those burghs, every burghess may carry on merchandise, with this exception, that, if he be a member of any incorporation, he must renounce his craft: But no instance can be given, in any burgh, of persons being allowed to carry on merchandise, without being entered burghesses: The burgh of Dumfries has no guildry; there too, as in Kilmarnock, persons who are not burghesses are admitted into the incorporated crafts; but it never was pretended that these persons are entitled to carry on merchandise.

4to, It is of no moment that the members of the incorporations are charged with part of the composition payable to the royal burghs. In all the royal burghs, the whole inhabitants, whether merchants or tradesmen, are by law subjected to pay their proportion of the land-tax: But, it would surely be thought a very extraordinary plea, if, on this account, the craftsmen of a royal burgh should pretend to the privilege of carrying on trade or merchandise within it. In the town of Kilmarnock, not only the members of the five incorporations, but the whole other inhabitants, contribute to this composition; so that, if those are, on that account, entitled to carry on merchandise, so are these.

‘ THE LORDS assoilzied from the reduction.’

Act. Lockhart. Alt. Advocatus. Clerk, Pringle.  
Wight. Fol. Dic. v. 3. p. 98. Fac. Col. No 54. p. 131.

1793. January 17.

The MAGISTRATES and TOWN-COUNCIL of PAISLEY, against The FREEHOLDERS and COMMISSIONERS of SUPPLY of the County of Renfrew.

PAISLEY is a burgh of barony, formerly holding of the Abbey of Paisley, and now of the Crown. It has kept up for many years a very secure jail, in which, owing to the insufficiency of the county prison in the royal burgh of Renfrew, most of the prisoners for crimes committed within the shire have been confined.

A difference of opinion having taken place between the magistrates and the freeholders of the county, respecting the burden of maintaining these prisoners, the magistrates brought two actions against the freeholders, commissioners of supply, and the collector of the rogue-money; the one concluding for certain sums expended by them, in maintaining prisoners for crimes committed within the county, exclusive of the town; and the other for sums expended in supporting prisoners for crimes committed within Paisley.

The freeholders seem not to have opposed the former, but they disputed the justice of the latter claim; and, in its support, the pursuers

*Pleaded:* Royal burghs alone are by law obliged to have jails. Paisley being merely a burgh of barony, is therefore not bound to have a prison at all. Mackenzie's Observations on the Act 1597, c. 277; Stair, b. 4. tit. 47. § 19.; M'Dowall, b. 1. tit. 10. § 197. Erskine, b. 4. tit. 3. § 13.; Dictionary of Decisions, *voce* PRISONER. If it had none, the whole criminals in the county, without distinction, would be sent to the jail of Renfrew, and there maintained out of the rogue-money, of which Paisley pays its proportion. It would be unjust, that by the voluntary act of upholding a prison, the magistrates should be loaded with the expence of maintaining any part of the prisoners; more particularly, as by doing so, they render themselves responsible for the escape of prisoners for debt, which of itself is a very considerable hardship. The statutes upon

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A burgh of barony, having a sufficient jail, is bound to maintain prisoners in it, for crimes committed within the burgh, out of its own funds; but is entitled to relief from the rogue-money, for the maintenance of persons confined in it for crimes committed in the other parts of the county.