

No 55.

St Ninians being a mile from Striveling, could noways fall under the act of Parliament, and could not be interpreted a suburb, being noways adjacent to the town.

THE LORDS found the declarator and condescendence relevant, and decerned.

*Fol. Dic. v. 1. p. 119. Stair, v. 1. p. 750.*

1676. December 7.

TOWNS of GLASGOW and DUNBARTON *against* The UNFREEMEN of GREENOCK.

No 56.

An unfreeman importing goods into a burgh royal, the penalty is confiscation, if found in the importer's possession; if out of his possession, action for the value is competent.

A burgh of barony can import the particulars allowed by statute, and no other; otherwise it would encroach on the privileges of royal burghs.

THE TOWNS of Glasgow and Dunbriton, pursue a declarator against the inhabitants of the burgh of barony of Greenock, for declaring, ' That it is the privilege of the royal burghs only, and not of the defenders, inhabitants of a burgh of barony, to import brandy, or salt; and that by importing thereof, the escheat of the importer's moveables falls to the burgh discoverer.'—The defenders *alleged, imo*, That it is the common privilege of strangers to import all commodities, making offer thereof to the burghs-royal, which cannot be refused to the King's subjects; and by the 100th act of King James V. it is declared, ' That all goods imported by freemen, or others his Majesty's subjects, shall be first offered to burghs-royal, and rates put thereupon.' Which act is ratified by Queen Mary, and accordingly hath been in constant custom. *2do*, By the late act of Parliament, anent the privileges of royal burghs, ' it is allowed to burghs of regality or barony to export the native growth of the kingdom;' which imports, that they may bring home all that is necessary for that export, and therefore may import salt and trees, without which they can neither export salmon, herring, beef, nor hides. *3tio*, By the said late act, *they are warranted to import all commodities usual for their manufactures*: And the curing of fish being a manufacture, they may import salt for that end, and are content to declare, That they shall not apply it to any other use; so that the burghs-royal may still enjoy the privilege of importing and selling of salt for all other uses; and if those who take fish for export, cannot have salt but from royal-burghs, that great interest of the kingdom by fishing, would be evacuate and monopolized to the burghs-royal; for they may, and have combined to sell no salt, or other commodities to the defenders, or any others as they please; or may sell it at such rates as their burgesses may easily undersell all others, and disable them to trade in fishes, which is the chief kind of growth of the kingdom, comprehending the rivers, lochs, and seas adjacent. *4to*, As to the penalty, the late statute being made of purpose to regulate trade, and having corrected all the former exorbitancies, it has particularly ordered the penalty of transgressors, both as to the matter and manner, viz. ' That where goods are imported by unfreemen, and are apprehended in the importer's hands within the burghs, their suburbs, or ports, they may be seized summarily, and confiscate, the one half to the King, and the other half to the burgh. And where they

' are deprehended in the importer's hands elsewhere, they may be arrested, and ' declared escheat by way of action ;' and the act contains a general clause, *annulling all former acts contrary hereto*, which therefore must take off the former acts for *escheating the whole moveables*, as well as the act declaring the transgressors to be in the King's will, which may be extended to capital punishment ; and the narrative of the statute mentions expressly *penal exorbitancies*, and therefore cannot be thought to intend any other penalty than what is expressed.—It was answered to the first defence, That the privilege of strangers can give no ground to unfreemen to import, making offer, *imo*, Because strangers making offer, though not accepted, can only sell to freemen, or otherwise may not break bulk, but must export it again out of the kingdom ; and this privilege is compensated by the like freedom to our burgesses abroad. And as to the act of James V. it bears nothing of a power to import, but only what shall be imported shall be rated by the burghs ; and therefore the restraint to sell till prices be made, though it were by unfreemen, does not imply that they did unwarrantably import ; but it is well consistent, that the penalties, both for importing and selling, before rates were set, might be enacted by several statutes ; but such an inference is taken off by the current of subsequent statutes, and especially by the last statute, bearing, ' That all privileges to export or import ' by others than freemen of royal burghs, except what is allowed by that statute, ' are prohibited,' which takes away all pretence from custom, though it were true, as it is not. And as to the defence for salt, there is no ground from the statute, which mentions salt, in the power to export, and so was under consideration, and therefore is purposely omitted in the import, though onions and other particulars of less moment be expressed ; neither can the power to export fish infer a power to import salt, or otherwise all the brewers and bakers may pretend the like ; and all unfreemen may import wine, spicery, and dying stuff, which may be made use of for improving native commodities : And as to the pretence of necessaries for manufacture, it is clear, by the whole strain of the statute for erecting of manufactures, that thereby is not meant every trade that was then ordinary in the kingdom ; for then all the smiths, taylors, shoemakers, weavers, and others, might not only import all things usual for their trade, but their stocks would be free of all impositions, and their persons of levying and quartering, which are expressly granted by that statute to the manufactures there meant : Which, therefore, are by the strain of the statute only meant public works, by one or more persons, gathering numbers of artificers, among whom they have power to make statutes ; and as to the penalty, it cannot be thought to exclude former consistent penalties, annulling only former acts contrary thereto, but not *præter et ultra* ; and it is the King's privilege as to the escheats of such transgressors, which cannot be taken away, but when expressed ; for seeing this statute hath no penalty, but in the case when the goods are in the importer's hands, it is easy for him quickly to dispatch the same, and then he is

No 56. free of all penalty, if the former penalty stand not; and, if both stand, observance of the law saves from both.

THE LORDS repelled the first defence, and found the privilege of importing, *with offer to free burghs*, competent only to strangers: They repelled also the defence as to the salt, and found that none but free burgesses could import the same; but to prevent the inconveniency, they appointed those of their number that are upon the Privy Council, to move, That an act might be made, 'That all free burghs should provide salt for furnishing the country, the fishing, and other uses; and that the price thereof should be determined by the council yearly, under sufficient penalties in case of transgression.'—THE LORDS found also, That the penalty of unfreemen importing, is only the confiscation of the goods imported; and that the seizure or arrestment, did only reach the same when apprehended in the importer's possession, correcting the former abuse of seizing the same in other hands; but that the importer was still liable by way of action for confiscation of the goods imported, or value thereof, but no further.

1678. December 20.

THE burgh of Glasgow pursues the unfreemen of the town of Greenock, for exercising freemen's trade, proper only for freemen in royal burghs, conform to the act of Parliament 1672, confirming the privilege of royal burghs, and libelling the particular goods only proper to be exported, or imported, by the royal burghs, and that the defenders ought to make payment of the value of the half of the goods so imported, or exported, in respect that, by the said act, the goods so imported or exported are to be confiscate, the one-half to the King, the other half to the burgh apprehender. The defenders *alleged* absolutor, because, by the statute founded upon, it is expressly statute in these terms, 'That if any man, not being freeman in the royal burghs, shall be found to have in his possession any goods to be bought or sold, exported or imported by him, contrair to the privilege of the royal burghs, granted by the said statute, the saids goods shall be wholly escheat, the one-half to the King, and the other half to the burgh apprehender.' By which it is evident, that the escheat of the goods is not competent to any burgh, but as it is apprehender of the goods unwarrantably imported or exported; so that the first apprehending-burgh hath right to the confiscation; and if Aberdeen had first apprehended, they would have excluded Glasgow, though they be the nearest burgh-royal; which apprehension is declared by the statute to be either by actual seizure *via facti*, where the goods are found in the possession of the exporter or importer within the burgh, or its privileges, or otherwise by arrestment of the said goods, being found in the possession of the exporter or importer, without the privilege of the burgh apprehender; but it cannot be subsumed, that Glasgow is the burgh apprehender of the goods in question, either by seizure or arrestment. It was *answered* for the pursuers, That their pursuit is very well founded, for the value of the half of the goods unlawfully exported or imported, for the Parliament did very prudently statute, that the confiscation of the goods, which is

*actio realis*, should only take effect when the goods were in the possession of the exporter or importer, otherways trade would be marred, if it induced *vitium reale*, that wherever the goods were found they might be confiscate; yea, though there had been arrestment, the buyer, acquiring *bona fide*, could not be in hazard of confiscation: And therefore it natively and necessarily follows, that, in place of the goods, which must pass currently by commerce, the value thereof should succeed, and be due by unfreemen, exporters, or importers. And though the law applies the half of the penalty of confiscation to the apprehender, yet the first pursuer, though without seizure or arrestment, is, by the said pursuit, apprehender; for the application to the apprehender is the better to hinder unfreemen's trade, that if the nearest burgh prove negligent, any burgh apprehender may have the benefit of confiscation; and therefore, after the clause of seizure and arrestment, there is a general clause subjoined of any action, according to law: But by common law, wherever there is a prohibition and a penalty, the transgressing the prohibition makes the transgressor liable for the penalty. 2do, Though this statute did only grant confiscation upon seizure or arrestment, and though it annul all prior contrary acts, yet it derogates not to prior consistent acts, and specially to the act 1503, cap. 84. whereby it is prohibit, *That any person dwelling without burghs use any merchandize*; that none pack nor peal in Leith, nor in no other places without the King's burghs, *under the pain of escheating the goods to the King's use, that beis taped, sold, packed or pealed*, whereby there is a confiscation of the saids goods to the King, without mention of deprehension, and which is only derogate from by this statute, in so far as the half of the confiscation is applied to the burgh apprehender. 3tio, This is *res judicata*; for the Lords formerly, by a decret of declarator, found the defenders liable for the goods unwarrantably imported or exported, if in their possession, or for the value thereof, if out of their possession; and if the case were dubious, what were meant by apprehension, that sense must be understood, which is *rei gerendæ aptior*, and which can be effectual, and not that which can have no effect: For if there must be either seizure or arrestment of the goods in the transgressor's possession, the law will be wholly eluded, and an encouragement given to unfreemen to break the law *impune*, and to steal and embezzle the commodities proper to royal burghs; for, by this statute, the privilege of royal burghs is much entrenched, and burghs of barony and others are warranted to export and import most necessary commodities, and so unfreemen may not only carry on their trade under the name of freemen, but when they land their ships at their own harbour, and need not enter at the royal burghs, but may enter such goods as they export, or import, at any burgh of regality, or barony, or any creek, it will be easy for them, with the goods, that they may import, to import goods only proper for royal burghs, which are not bulkish, as silk, laces, spiceries &c. which one may import and immediately sell to another shopkeeper, whereby it is impossible to deprehend the goods in the importer's possession, much less in the exporter's; so that both the King's custom and his

No 56.

half, and the burgh's half, of unlawful commodities, shall be securely rendered ineffectual, and the burghs royal, who, upon account of their trade, pay the sixth part of all taxations, shall be glad to renounce their privilege, and become burghs of barony. It was *replied* for the defenders, that it is clear by this statute, that confiscation cannot take place, but when there is a burgh apprehender, and when goods are in the actual possession of the importer or exporter; nor is there any mention of a personal obligation to pay, unless a real interest to confiscate; so that whatever was the tenor of former acts, burghs had never confiscation of the goods unwarrantably exported or imported, but by this statute, and so can only have it in the terms of this statute. For the act 1503 gives the confiscation to the King, and relates not only to the royal burghs, but to other burghs, without which nothing can be taped or sold, proper to burghs, as silk, wine, spicery, or staple goods, nor packed or pealed without the royal burghs, under the pain of confiscation. But, by the act 154, Parl. 1592, *The whole moveables of the transgressors are escheat, to the King the half, and the other half to the burgh apprehender, which* derogates to the first act, and requires apprehension, and this act derogates to both, and requires apprehension in the actual possession of the transgressor: Nor can it with any colour be pretended, that a citation is apprehension, even though it were used when the goods were in the transgressor's hand, much less when the same are out of his possession. And as to that clause in the decret of declarator, *Finding the transgressor liable if the goods be out of his hand, that is, when there hath been a preceding seizure, or arrestment of the goods in his hand.* But whether seizure or arrestment was first requisite, was neither debated nor determined in that decret. And as to the inconveniency alleged, statutes must be judged as they are made, and not as they might be most conveniently made; but the inconveniencies on the other side are far greater, for if traders out of royal burghs shall be liable to trouble and hazard, upon the account of goods imported or exported any time within forty years, it would deter them from all trade, to the public detriment. But if arrestment must proceed, it will prescribe within five years, if action be not raised, or in ten, if it be not repeated every five years.

THE LORDS found, that the pursuers could have no action for confiscation, unless there had been a preceding seizure, when the goods were within burgh, or arrestment without the burgh; the goods in both cases being in the possession of the importer or exporter: But found, that those who did export or import, without lawful entry, were still to be presumed as possessors, for *pro possessore habetur qui dolo desiit possidere*, and that arrestment might be made in their hands at any time, as if the goods were actually in their hands: But where entries were lawfully made, that the burghs apprehenders behoved to arrest in the hands of unfreemen, importers or exporters, or in the hands of freemen who traded in trust for unfreemen's behoof, which could easily be done by the King's waiters, wherever entries were made, if the burghs suspected unfreemen's trade.

\* \* \* Dirleton reports the same case :

THE town of Glasgow having intented a declarator against the Laird of Greenock, containing these conclusions, viz. That it should not be lawful to Greenock, or his burgh of barony, to import any goods from abroad ; which, by the late regulation, and act of Parliament concerning the privileges of burghs royal, being the 5th act of the 3d session of the 2d Parl. of Charles II. belongeth to the royal burghs ; are to be imported by them *privative*, and in special, wine, brandy and salt : *2do*, That if they should be found to contravene the said act of Parliament, that the unfree goods deprehended should not only be escheated, but their whole goods, conform to former laws and acts of Parliament against unfreemen.

No 56.

It was *alleged* for the defenders : That, at least, they ought to be in the same case as strangers, and unfreemen of foreign nations, who may import without limitation, making offer to the royal burghs ; and if they do not buy the same from them, being obliged to sell them in wholesale, and at the price to be limited and appointed by the burgh where offer is made ; and that the burghs of barony had been in use of importing as strangers, the same being qualified as said is ; and the said custom was not contrary to law, but conform to divers acts of Parliament ; and, in special, the 100th act of King James V. his seventh Parliament, bearing, That if any freeman or other Scotsman dwelling within this realm, should bring home wines, salt, or timber, that the magistrates of burghs, where the same is entered, should set a price upon the same ; which imports that unfreemen may import the same.

THE LORDS found, That by the said late act of Parliament, the matter of trade is so regulated, that as the burghs of barony their privileges to import goods and commodities, that they could not import before, are settled upon them ; and, on the other part, royal burghs are secured from the encroachment of burghs of barony ; so that they cannot import, but the particulars allowed to them by the said act : Therefore that, upon no pretence, the burghs of barony and unfreemen can import any other goods ; and that they are not to have the liberty that strangers have, seeing strangers are allowed the liberty of trade and commerce, being qualified as said is : And, if the same were denied, there would be no trade betwixt our merchants and them : Whereas the liberty of trade, and to import foreign commodities, is only lodged and settled upon royal burghs, upon good considerations, and, *intuitu* of the same, they are liable to a sixth part of taxations and other public burdens. *2do*, It was found, That albeit in the late act of Parliament there be not mention of salt as one of the commodities allowed to the royal burghs, and contained in the specification, that the same does only belong to the royal burghs ; seeing they are founded as to all commodities, not expressly allowed by the said act to burghs of barony and regality *in jure* : And the burghs of barony are excluded, by the said act, as to all others, except those allowed to them expressly by the said act ; and come

No 56.

under that general, viz. such as are necessary for tillage or building, or for the use of their manufacture.

And whereas it was pretended by the defenders, that salt is necessary for the curing of their fishes: THE LORDS found, That manufacture, intended by the acts of Parliament, is only to be understood of works erected by companies, or others, for making of cloth, or such like, about which many poor people are employed and entertained: And though there be skill in curing herring, they are not a manufacture, but a native commodity, without any alteration of the form, and only qualified by the curing of the same: And that, upon that pretence, the defenders ought not to be allowed to import salt: But it was recommended to some of the Lords, being also upon the council, to move that a course might be taken for regulating the price of salt; that it be not arbitrary to the royal burghs, to sell the same at such rates as the burghs of barony cannot, without prejudice, buy the same; so that they may be forced to desist from making or exporting herring.

THE LORDS found, That the said act having defined the pain to be the escheat of the goods deprehended, and not the escheat of the contravener's whole goods; and that as to goods not deprehended, the pain ought not to be greater; and that those who import unlawful goods, contrary to the act, though they be not deprehended, may be pursued for the value of the same, and no farther.

Some of the Lords were of another opinion as to this point, and thought, that seeing the late act of Parliament doth mention only the case of unlawful goods deprehended; and doth regulate the former practice as to the attaching and affecting of the same; and it is inconsistent, that both the goods deprehended should be escheat, and likewise the contravener's other goods should be escheat; that therefore the former laws are still in vigour. *In præsentia.*

Act. Lockhart, &c.

Alt. Cunningham.

Dirleton, No 395. p. 193-

\* \* \* Gosford also reports the same case:

IN a declarator at the instance of the Town of Glasgow against the Inhabitants of the Town of Greenock, to hear and see it found, that they had contravened the acts of Parliament, by importing wine, brandy, and salt, which is the privilege only of the royal burghs, and so ought to be discharged as unfree-men in all time coming; as likewise that for bygone contraventions, they had escheat their whole moveables, which belonged to the King and his donatar: It was *alleged* for the defenders, That the declarator could not be sustained, because the importing wine, brandy, and salt, or any other commodity reserved in favours of royal burghs, by the 100th act, Parliament 7th, King James V. and the 57th act, Parliament 6th, Queen Mary, ratifying the same; it is declared lawful to strangers to import the said commodities, they making offer thereof, before sale, to royal burghs; and conform to the said act, they offer to prove,

that the inhabitants of burghs of regality and barony, have been in possession of importing these goods, brandy being but a species of an *aqua vitæ*, and salt being a necessary commodity for manufactories; and all that are erected in a society by the late act of Parliament, they have privilege to import salt, or any other commodities that are necessary for manufactories; whereof none is so considerable as the making of salt herrings for export; and, as to all native commodities exported, it being indulged to all subjects within burghs of regalities and baronies, to import foreign commodities; and, when they are imported to manufactories, they are declared free of custom and excise; so that they can never be deemed to have contravened the acts of Parliament. It was *alleged* against the second member of the summons, that it could never be declared, that, by contravention, they had escheated their whole moveable goods, because, by the late act of Parliament, which expressly declares the privileges of royal burghs, it is statute, that the contraveners, by importation of prohibited goods, shall only escheat the same upon seizure.—It was *replied* to the first allegiance, founded upon the acts of Parliament King James V. and Queen Mary, That notwithstanding thereof, the declarator ought to be sustained: *1st*, Because by the late act of Parliament anent the privileges of burghs royal, cap. 5. 3d sess. 2d Parliament, Charles II. as to export and import, it is thereby expressly set down, that it is the privilege only of freemen of royal burghs to import wine, wax, silk, wald, and other materials for dying; as likewise what is lawful to the inhabitants of other burghs to export of native commodities, and to make returns thereof; which act being to the great advantage of unfreemen, the said act expressly repels all former acts of Parliament, and cannot be extended to the particulars now in question: *2do*, Albeit by the prior acts cited, there is an indulgence given to strangers to import, they making offer to royal burghs before disposal thereof; yet, by an express act made by King Charles I. first Parliament, act 24, it is ordained, that no persons but burgesses of royal burghs shall use any trade or merchandising; and expressly the said act of Queen Mary and King James V. are repelled as to all unfreemen; and albeit for a reason of state, foreigners have been permitted to import foreign commodities, they making offer to royal burghs before they break bulk, lest if that were discharged, the like might be done by all foreign kingdoms and states, and so would interrupt all foreign trade and commerce with this kingdom; yet that can never be extended to unfreemen who cannot pretend that reason; and if it were granted, would ruin the whole burghs royal in Scotland, who, by the fundamental laws of this kingdom, are liable to the sixth part of all taxations, in consideration of their privilege for importing foreign commodities; and, if it were otherwise, all burgesses would desert royal burghs, and live in a burgh of regality or barony. *2dly*, As to the particulars contravened, brandy cannot be thought the product of *aqua vitæ*, being the product and species of wine, which is only the commodity of foreign kingdoms; whereas brandies made here are of ale made of bear; and for salt, that it is a necessary commodity for manufactories of salt herring, which



No 56.

ought to be repute a manufactory, seeing without it, they cannot be made and exported; there is no reason to esteem salted herrings a manufactory more than other fish salted, or salted fleshes, which can never be repute a manufactory, or in the number of those manufactories whereof all the essentials are made up of goods that are not native of this kingdom; and, if it were otherwise, all products of hides, skins, linen cloth or woollen, might be interpreted manufactories, which requires something of foreign commodities to make them be preserved and fit for exportation; which is against all reason, and would include the greatest part of trade of exported goods.—It was *replied* to the second, That declarator ought to be sustained for escheating of the whole goods, because, by the foresaid acts of Parliament in King James V. and Queen Mary's time, it is so declared; and as to the point of escheat never being repealed, albeit by the late act of Parliament it be declared, that the goods seized upon be confiscated, that takes not away the benefit of prior penalties, which they have right to by the law.—THE LORDS having considered all the acts of Parliament, and what was alleged *pro et contra*, did unanimously find, that, as to wine, brandy, and foreign salt, none had the privilege to import them but burgesses of royal burghs and freemen; and that the inhabitants of other burghs could not import foreign salt upon the pretence of a manufactory, and could not buy foreign salt but from burgesses, the custom and the excise being paid; and that unfreemen were not included in the privilege granted to strangers, to import and make offer; so that the act of Parliament anent manufactories did not exeem them, salt herrings not being of that nature; and that the late act of Parliament anent the privilege of royal burghs not giving them any special liberty as to the goods contraverted, they ought to be declared contraveners. As to the *second* point, anent the escheat of all goods, there was debate amongst the Lords, but at last it was carried, few dissenting, that the penalty should only be the escheat of the particular goods imported and not entered; upon that consideration, that the last act of Parliament determining so, ought to be the rule, and, in effect, was inconsistent with the escheat of all their moveable goods who contravened it, *et in penalibus lex non extenditur*, there being no reservation of prior penalties, which was just.

*Gosford, MS. p. 590. No 913. & 914.*

1697. *January 8.*

MERCHANTS and GUILD-BRETHREN of the TOWN of Stirling, *against* The DEACON CONVEENER of the Trades.

No 57.

*Tradesmen, although burgesses, are under prohibition by statute, to carry on*

PHILIPHAUGH reported the mutual declarators between the Merchants and Guild-brethren of the town of Stirling, on the one part, and the Deacon Conveener of the Trades on the other. The question arose upon one Cuthbert, a skinner, keeping a merchant shop, not for selling of skins, but for retailing of