

Culross raised a declarator against them, to have it found, That the said incorporation had the sole and exclusive privilege of making girdles in Culross for the service of all Scotland: And this right they founded upon two royal grants, the one by King James VI. in the year 1599, and the other by King Charles II. *anno* 1666, and ratified in Parliament in the 1669.

It was *answered* for the defenders, That all perpetual monopolies were odious and unlawful; that these private grants were surreptitious; and even the ratification in Parliament could not mend the matter, being granted *parte inaudita*, under a *salvo jure*; and therefore these grants could not prejudice the burgh of Kilmarnock, which had, by a prior grant, *anno* 1592, ratified in Parliament that same year, a *jus quæsitum* of having all trades and artificers which any free burgh had been in use to have.

Replied, That such a general privilege of having all trades, &c. could not restrain the Crown from granting a special privilege of exercising a particular trade to one society: That all monopolies were not absolutely unlawful, and therefore the Crown, by its prerogative, might, for good reasons, grant a privilege of this kind; and in the present case there was a very good one, namely, that this art was first invented in Culross, and carried to the utmost perfection there. And Grotius observes, *lib. 2. cap. 12. § 16. De jure belli*, That, *non omnia cum jure naturæ pugnant, sed possunt interdum a summa potestate permitti justa de causa*; and he mentions several monopolies granted under the Roman government.

THE LORDS found, That no such perpetual monopoly could have been granted in prejudice of this or any other burgh.

Reporter, Lord Pollock. Act. Jas. Boswell. Alt. Sir Tho. Wallace. Clerk, Dalrymple.
Fel. Dic. v. 3. p. 105. Edgar, p. 145.

1738. December 1.

INCORPORATION OF BARBERS OF EDINBURGH AGAINST M'DUFF AND MENZIES.

DANIEL M'DUFF had been admitted a freeman of the incorporation of barbers of Edinburgh, and had practiced the trade for several years. He accepted of the office of tide-waiter at Leith, and went with his family to reside there. George Menzies his nephew, who had been a journeyman with others in the trade, opened a shop, without entering burghess. He was prosecuted. M'Duff put his own name upon the sign-board, and entered into an indenture with Menzies.

The Dean of Guild and Council found: That the said Daniel M'Duff, as he is not a resident burghess, has not the privilege of taking apprentices, for the freedom of the burgh or the incorporation; and that he is not entitled to carry on the trade of wig-making or barber craft, by the said George Menzies; and

No 60.

grants ratified in Parliament, giving them the exclusive privilege of making girdles for all Scotland. It was found that no such perpetual monopoly could be effectually granted.

No 61.

A non-resident burghess has not the privilege of taking apprentices for the freedom of the burgh; and is not entitled to carry on his trade by means of apprentices or others.

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-