

No. 12. It was farther contended upon the merits, that there was no reasonable ground of complaint in this case, and that the act of parliament conferred a power upon the Lieutenancy, of supplying all deficiencies as they arose, by ballot in the first instance, without waiting for the slow and inefficient mode of supplying them, by employing the penalties.

The Court, upon advising the petition and answers, by a very narrow majority, adhered to their former interlocutor.

There was great difference of opinion upon the Bench. It was conceived, on the one hand, that the supreme Court was bound to give redress in every case where a Lieutenancy had exceeded the powers committed to them, or proceeded in opposition to the act of parliament, and therefore that it was absolutely necessary to inquire into the merits of this case, to discover whether the jurisdiction of the Court, by means of advocacy and suspension, was excluded. It seemed likewise to be the opinion of several of the Judges, that the Lieutenancy had in fact exceeded their powers, and that a second ballot was not competent by the act of parliament in the present case. But the majority of their Lordships could not get over the express and direct terms in which advocations and suspensions are prohibited in the statute, for which there seemed a sufficient reason, in the necessity which existed, of having an immediate effective force: And therefore without entering deeply into the merits, they were of opinion that the bill should be refused as incompetent.

Lord Ordinary, *Cullen*. For Suspendor, *Gillies*. Agent *Jo. Peat*. Alt. Solicitor-General *Blair, Burnet, Ar. Campbell junior*. Agent, *Ja. Robertson, W. S.* Clerk, *Home*.

J. *Fac. Coll. No. 177. p. 398.*

1804. *November 21.*

RAITT, and Others, against MAGISTRATES of ABERDEEN.

No. 13.

The Magistrates of a royal burgh, have no jurisdiction entitling them to extend petty customs beyond use and wont.

THE Magistrates of Aberdeen have been in use, from time immemorial, to levy a small duty upon cloth manufactured in the neighbourhood, and exposed to sale in the public market. But though, in the table of duties issued by the Magistrates, their tacksmen were empowered, in general, to exact the duty on all cloth brought to market for sale, it was not levied upon foreign cloth sold in the market, or upon any cloth sold in the shops, but was confined entirely to home-made cloth, exposed to sale in booths upon the streets.

A few years ago, the Magistrates authorised their tacksmen to demand a duty upon all cloth without exception; upon which the dealers in cloth presented a bill of suspension, and raised an action of declarator, concluding, that the Magistrates had no powers to exact any duty upon cloth sold in their shops, either of home or foreign manufacture.

The Lord Ordinary found, ' That the Magistrates have no authority to introduce new petty customs, or extend the old ones, whether in their amount,

‘ or as to the persons subject to them, beyond the amount and liability established by use and wont : That the defenders do not allege, or offer to prove any usage within the years of prescription, of levying, generally, on cloth sold, or kept for sale or exportation in shops or ware-houses, within the royalty, by freemen burgesses, the same or any other customs, such as the petty customs levied on cloth brought to the public weekly market of the burgh, and exposed there to sale by strangers or others: Therefore, in the declarator, decerns, as libelled, us to the freedom claimed from paying any petty customs on woollen or linen cloth by freemen in shops or warehouses within the royalty, for sale or exportation ; and in the suspension, suspends the letters *simpliciter*, and decerns

The Magistrates reclaimed, and pleaded, that the exaction claimed was no extension of the powers of the Magistrates, beyond the letter of the ancient grants to the city ;—that from the earliest periods they had been in use of publishing tables of customs, imposing a duty upon all cloth brought within the burgh for sale, without distinguishing whether it was of foreign or home manufacture, or whether it was sold in the shops, or in booths and stalls ;—that originally all cloth exposed to sale was sold upon the streets ;—that if any disease had arisen in the payment of the duty, by any of the persons liable for it, it could not affect the privileges of the burgh, or create an immunity for the future ;—that the distinction attempted had no solid foundation ;—and that the more extensive dealers, who sold cloth in warehouses, were more able to pay the duty than those who were in use to sell it upon the streets.

Answered : This is an attempt in the Magistrates of a burgh to impose a tax upon the inhabitants, which belongs only to the Legislature. There is no such thing as a discretionary power in Magistrates to impose new, or increase old duties, unless with the approbation of the community ; Town of Aberdeen against Lesk and others, 11th January 1678, No. 16, p. 1866 ; Erskine, B. 11 Tit. 4, § 22 ; Bankton, B. 4, Tit. 19, § 2. All the duties levied within the burgh are regulated by use and wont ; and an attempt to increase these duties, at the pleasure of the Magistrates, has been found to be beyond their powers ; Boog against Magistrates of Burntisland, 22d February 1775, No. 103, p. 1199 A ; Tuck against Magistrates of St. Andrew’s, 15th June 1781, No. 106, p. 1297 ; Judgment of the House of Peers, in the case of the Magistrates of Edinburgh against Corporation of Fleshers, 24th June 1802, Non 6, p. 10.

APPENDIX; PART I. *loc. cit.* BURGH ROYALTY

The Court adhered.

Lord Ordinary, *Meadowbank*. Act. *Baird*. Agent, *Jo. Morison, W. S.*
 Akt. *Burnett*. Agent, *Jo. James, jun. W. S.* Clerk, *Colquhoun*.

had no right to interfere with stranded vessels, or prevent the owners of the cargo from disposing of it as they thought proper; 12th Anne, § 2. Cap. 18; 4th Geo. I. Cap. 12; 26th Geo. II. Cap. 19; 17th February 1725, Monteir, No. 4. p. 16796; 19th February 1751, Lord Panmure, No. 6. p. 16798; Erskine, B. 21. Tit. 1. § 18; and concluding, "That the said Lord Dundas, James Watson, and James Sinclair, are liable, conjunctly and severally, in damages to the complainers, to the extent of £500."

No. 14.

It was answered upon the part of the Admiral, That he had a power with regard to stranded vessels, to take charge of the vessel and cargo for behoof of all concerned; that stranded ships were inserted in the commission granted by the Crown to the Admiral, and that the usage of Orkney hitherto has been invariable with regard to this jurisdiction. It was further contended, that it was highly expedient this trust should be reposed in the Admiral, who was a responsible person, instead of agents, who offered their services with a view to their own emolument, and had no regard for the interest of the proprietors of the cargo.

The Court, upon advising the petition and complaint, with answers, replies and duplies, were clearly of opinion, that the proceedings of the Vice-Admiral-depute, and his Procurator-fiscal, were illegal and unwarrantable. They therefore found them liable in damages and expenses, and remitted to the Lord Ordinary to proceed accordingly.

Lord Ordinary, Glenelg. Act. Clerk, Gillic. Agents, J. Macvicar. Alt. Solicitor-General, Blair, Robertson, Bruce. Agent, G. James, W. S. Clerk, Mackenzie. J. Fac. Coll. No. 196. p. 439.

1805, February 27. GRAHAM, Petitioner.

THOMAS OLIVER, merchant in Hawick, having refused payment of his accepted bill to John Graham, brewer there, a protest (2d Jan. 1805) was taken, and recorded in the Bailie-court books of Hawick. An extract of this protest, having a decree interponed by the Magistrates of that Burgh, together with their precept subjoined in common form, having been presented to the Clerk of the Bills, for letters of horning, a doubt occurred, how far such was competent.

The point was reported by the Lord Ordinary on the Bills.

Hawick is a Burgh of Barony, independent of the superior. Its privileges are enjoyed, in consequence of a charter of erection, by James Douglas of Drumlanrig, dated 11th October 1537, proceeding on the narrative, that the old charters and evidents had been lost and destroyed by the inroads of the English and thieves, in the bypast times of enmity and war, by which it appeared, that

No. 15.

Horning competent on the extracted decrees of the Magistrates of Burghs of Barony, if they have been made independent of their superior, prior to the jurisdiction act.