

made heritable, it was disjoined therefrom, and granted heritably to the claimant, whereby it came to be described as lying within that stewartry, of which it had really been a part; besides, as Kirkcudbright was no sheriffdom, but the Stewart did the functions of the Sheriff, Gairlies continued to remain in that respect within the Great Stewartry, as other stewartries were within the respective shires where they were locally situated.

*Pleaded* for Annandale, That the presumption was, this office was erected, before the estate came into the hands of the King, by the proprietor who had granted the stewartry of his barony of Gairlies, which was no more than the office of a Baron Bailie, at that time called Stewart: That, on the lands falling into the King's hands, by the forfeitures of the Earls of Douglas, to whom they had belonged; or, perhaps, on the forfeiture of some other family, to whom they had formerly belonged, the Great Stewartry was erected; but the former jurisdiction still subsisted, and was granted together with the barony of Gairlies, which was, therefore, rightly described as lying within the Stewartry of Kirkcudbright.

THE LORDS found the Earl of Galloway entitled to a recompence for the stewartry of Gairlies.

*Fol. Dic. v. 3. p. 363. D. Falconer, No. 248. p. 333.*

1775. *January 26.*

ADAM BEGBIE, DEACON, and WILLIAM GIBSON, Boxmaster, to the Incorporation of Tailors of Potterrow and Bristo, *against* THOMAS BROWN, Tailor in Potterrow.

IN 1594, a Seal of Cause was granted by John Towers, Baron of Innerleith, and Patrick Knox, one of the Bailies of the barony, erecting the tailors of that barony, of which the village of Portsburgh was a part, into a society, with certain immunities and privileges. It ordains, 'That no person shall be allowed to work as a tailor within the bounds of the Potterrow, Easter and Wester Crofts of Bristo, except they be first presented to the Baron and his Bailies; that their life and conversation may be tried, and their free goods, and armour for defence of the country, known, and be enrolled amongst the brethren of that craft in the Baron books, and to pay a certain composition into the box of the craft, as shall be agreed upon.' The sum paid, in name of entry money, is not ascertained in the Seal of Cause; but immemorial usage has fixed it at the sum of one hundred merks.

Portsburgh and Bristo made a part of the barony of Innerleith, of which the family of Towers were superiors, when the Seal of Cause was granted in the 1594. Afterward, the lands of Portsburgh and Bristo were disposed of by that family to Hepburn of Humbie; and from him the Town of Edinburgh pur-

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The barony of Portsburgh was sold in 1649 to the Town of Edinburgh. Found, that the jurisdiction of the Bailie of that barony was not taken away by the Jurisdiction Act, but fell under the exception, "That nothing in this act shall extend, or be construed so as to take away, extinguish, or pre-

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 in Scotland."

chased these lands, and were infeft, in virtue of a Crown charter, in the year 1649, proceeding upon the resignation of Towers, in favour of Mr Hepburn. By the Town's charter, these lands, along with some others purchased by the Town, are erected into a barony, by *novodamus*, with a clause of exemption from the jurisdiction of the Sheriff of the county. And, by an after clause, the barony of Portsburgh is of new erected into a burgh of barony; and there is conferred upon the Magistrates the privilege, 'eligendi, creandi, faciendi, et continuendi, balivos, clericos, officarios, serjandos, et alios officarios necessarios infra dict. burgum baroniæ pro gubernatione ejusd. ac eligendi, mutandi, aut retinendi dictos balivos, clericos, et alios officarios annuatim in dictis ipsorum officiis, ac etiam faciendi leges et statuta, pro meliore gubernatione dicti burgi baroniæ, prout ipsis videbitur expediens.' This charter of the Town of Edinburgh is recorded in the records of Exchequer; and, since the purchase of the Town of Edinburgh in the 1649, the districts of Portsburgh and Bristo form one jurisdiction, and are governed by two Bailies, who are appointed by the common Council of Edinburgh.

In 1774, an action was brought before the Bailie of the barony of Portsburgh, at the instance of the above named persons, against Thomas Brown, tailor in Potterrow, libelling upon the foresaid Seal of Cause, and concluding, that, as Brown had refused to enter freeman of the incorporation, he should be obliged to take down his sign, desist from working within the barony, and should pay the sum of L. 5 Sterling, in name of damages, besides the expense of process; in which the Bailie pronounced an interlocutor, finding, that, as he had refused to consign the 100 merks, and to comply with the regulations of the society, he should desist from working as tailor within the barony, and pay 10s. of expenses.

This judgment having been suspended, with regard to the Seal of Cause, the suspender

*Argued*, That it cannot possibly afford the chargers any title to insist in the present action, in that there is nothing produced and founded upon, but an extract from the books of the Baron Court, signed by their clerk, which is not evidence in law, either of the tenor of the Seal of Cause, or even of its actual existence; for the Baron Bailie Courts are not considered as Courts of record; hence no extracts from their books can be held as probative in any degree whatever; and, of consequence, the title upon which the chargers found their action must fall to the ground.

But, farther, the suspender must beg leave to question Mr Towers's title, as Baron of Inverleith, to erect any incorporation, with the exclusive privileges contended for by the chargers; as it is apprehended, that no society can be a legal incorporation, to such an extent or effect, without the authority of King or Parliament. And, in support of this objection, as well as to confute an argument used by the chargers, that, independently of their Seal of Cause, they have a *persona standi*, and a right to carry on the present action, as a private

society, the suspender referred to the decision pronounced in this Court, 13th February 1761, Crawford against Mitchell, *voce* SOCIETY.

In support of his *second* reason of suspension, *viz.* That the Baron Bailie of Portsburgh is not a Judge competent to try and determine in the present question, the suspender

*Pleaded,* That the power and jurisdiction of Baron Courts are, by the act the 20th of George II. abolishing heritable jurisdictions, clearly and expressly limited to questions where the debt and damages are under 40s. Sterling; excepting only from this limitation, actions for recovering and uplifting the Baron's rents.

And, as to the clause in the act above mentioned, which the pursuers had founded upon, *viz.* ' That nothing in this act shall extend, or be construed, ' so as to take away, extinguish, or prejudice any jurisdiction or privilege by ' law vested in, or competent to the jurisdiction and community of, any Royal Burgh in Scotland ;'

By the charter from the Crown, in favour of the Town of Edinburgh, no greater privilege is conferred on them than was on Hepburn of Humbie, or Towers his author, original superiors of the land. The Magistrates of Edinburgh, therefore, as superiors or barons of these lands, are to be looked upon merely as individuals: As, therefore, the jurisdiction and privileges of Royal Burghs are not reserved to them by the act, as individuals, but as communities, the Magistrates of Edinburgh do not fall under the statute, as Barons of Portsburgh; nor can that barony be affected by the above clause, any more than it would have been, had the Town of Edinburgh's authors been still superiors. The Town of Edinburgh, as a Royal Burgh, has all its privileges and jurisdictions reserved; but, when it stands in the light of a private baron, it must suffer, in that character, the restrictions laid on by the act of Parliament; the jurisdiction of its Baron Bailie must be confined to causes within 40s. or such as regard payment of its rents and profits.

Upon the *first* point, the chargers

*Answered,* That through all Scotland, and, particularly, within the baronies and Lordships belonging to the City of Edinburgh, numberless incorporations and societies have been instituted for the support of the police, and for the maintenance of the poor. The privileges of these societies, being of the greatest advantage to the country, have always been protected by Courts of law, especially when the privileges appear to have received the sanction of long and undisputed usage; being undoubtedly as lawful as they are expedient, especially when erected within regalities or baronies, whose superiors are considered, by the genius of our law, to be the proper guardians of police, and the protectors of good government.

As to the Seal of Cause, in this case, an extract of it is produced under the hand of the clerk of the Bailie Court.

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A Baron Court, in some respects, is not considered as a Court of record. But, certainly, in matters which respect their own jurisdiction, and their own privileges, every order of Court may be preserved, and extracts of it by the clerk must be held as sufficient evidence.

Next, with regard to the title to prosecute, it will be observed, that this action is raised by the Deacon and Boxmaster of the society of tailors, "for themselves, and as representing the incorporation." There can be little doubt, that the Deacon or Boxmaster, as representing their society, are entitled to prosecute their rights and privileges, especially before the Judge of the territory. Were there any difficulty upon the general point, it is entirely removed in this case, by the manner in which the libel is laid, founded upon the undoubted interest of the Deacon and Boxmaster, who are themselves tailors, to prevent every encroachment upon the privileges of their society.

The next point to be considered is, whether the Bailie of the barony of Portsburgh enjoys the jurisdiction of determining the privileges of the societies within the bounds of the barony?

Jurisdiction is inseparably connected with property, Stair, B. 2. t. 4. § 9. and B. 2. t. 3. § 2; Bankton, B. 4. tit. 16.; Erskine, B. 2. t. 3. § 46.

Again, this jurisdiction of the Bailie has been supported by usage; and there is not perhaps any country in which long usage or consuetude operates more powerfully than in Scotland; Dictionary of Decisions, *voce* CONSUETUDE.

The chargers have discovered no instance of any opposition having been made to the jurisdiction of the Bailie of Portsburgh, that respect the society of tailors. However, the chargers aver, that many such cases have occurred as the present one; but, upon a complaint made to the Bailie against any person who attempted to settle in the barony, without entering a member of the incorporation, or even upon information that such a complaint was intended, the persons thus transgressing upon the privileges of the incorporation, have always either entered members of it, or have desisted from carrying on the profession within the liberties of the barony. All the cases which the chargers can discover, to ascertain the extent of the Bailie's jurisdiction, respect the other societies, which are entirely in a similar situation, constituted by seals of cause. And the chargers instanced the following, viz. a petition and complaint against John Hastie, a painter, for having worked in Portsburgh and Potterrow in 1750. Another, of the society of barbers, against George Milne in Potterrow, for having exercised his profession, although an unfreeman, within the barony. And a third, of the incorporation of baxters against several persons, for putting up signs of bread upon their doors and windows; in all which, the respective corporations within the city were also parties, in virtue of an agreement between them and the incorporations in Portsburgh and Potterrow; and, in each of these cases, the Bailie had pronounced judgment against the delinquents.

But, did the smallest doubt upon this subject remain, it must be removed, by attending to the clauses in the town of Edinburgh's charter, in the 1649:

‘ Eximimus a privilegio et jurisdictione vicecomitis vicecomitatus nostri de  
 ‘ Edinburgh. Et concedimus balivis et consulibus de Edinburgh, pro nunc et  
 ‘ in perpetuum, officium vicecomitis, infra bondas terrarum supra specificatas.’  
 The lands here alluded to are the baronies of Portsburgh and Potterrow.

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So much with regard to the jurisdiction of the town of Edinburgh, upon their general privileges as barons, and as conveyed to them by the Crown in the 1649.

If the Court are satisfied that the town ever enjoyed a jurisdiction sufficient to determine the present question, it will certainly appear equally clear, that it is preserved to them by the jurisdiction act 20th George II. It is declared, ‘ That nothing in this act shall extend or be construed so as to take away, extinguish, or prejudice any jurisdiction or privilege by law vested in, or competent to the incorporation or community of any royal burgh in Scotland,’ &c. By another clause, this reservation is extended to ‘ corporations of any regality or barony, the magistrates of which are independent of the lord of regality or baron.’

The chargers will not give themselves the trouble of defining the extent of such jurisdiction as belongs to royal boroughs, or boroughs of regality and barony, whose jurisdictions are preserved by the act of Parliament; yet, see Bankton, B. 3. tit. 10. § 47.; Erskine, B. 1. tit. 4. § 21. All that the chargers contend is, that the baron-baillie of Portsburgh still enjoys a jurisdiction sufficient for vindicating the rights of the societies within that barony.

*Observed on the Bench:* The objection, that the principal seal of cause is not produced, comes too late. In fact, they have a very good seal of cause. It is the baron and bailie, sitting in judgment, who interpose their authority, and ordain their order or ordinance to be obeyed. Many such societies have been erected upon no better foundation, *e. g.* Kilmarnock, Paisley, &c. and it were dangerous to overturn them. There are even many burghs of barony where corporations have been created by long and established usage. In the case of the town of Kelso against Duke of Roxburgh, all the seals of cause were lost, but they had had continued possession.—As to the *second* point, this is the very question that was disputed in the case from Gorbals, (vide No 97. p. 7381.); nay, the present case is much stronger; for Portsburgh, in 1469, was erected by the Crown into a burgh of barony; which cleared a doubt expressed by some of the other judges, on the notion of this being merely a common barony.

THE LORDS ‘ found the letters orderly proceeded.’

Reporter, *Alva.*

Act. G. Clerk.

Alt. H. Erskine.

Clerk, Ross.

*Fol. Dic. v. 3. p. 364. Fac. Col. No 218. p. 170*