

1696 and 1697. The INHABITANTS of LEITH *against* The MAGISTRATES of EDINBURGH.

1696. *Dec. 11.*---I REPORTED the declarator, raised by the Inhabitants of the town of Leith against the Magistrates; that though they be their superiors, and so have right to their feu-duties, and other casualties, yet, being a burgh of barony, they ought to have the same privilege of trade with the other baronies of the kingdom: Or if the town will deny them a communication of trade, then they cannot stent and tax them to pay a proportion of the burden that follows trade; this were like the Egyptian slavery,---to exact the number of bricks and yet to refuse them straw.

The Lords resolved to hear the case in their own presence.

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1697. *January 22.*---The Town of Leith's declarator against the good Town of Edinburgh, mentioned 11th December 1696, was debated. They first contended, they ought to enjoy the privileges of a royal burgh, in so far as, by a contract between Mary Queen of Scots, and the inhabitants of Leith, in 1555, she is obliged to erect them into a royalty, and in the meantime gives them a right of bailiary; and though, since that time, Edinburgh has acquired the superiority of Leith, yet the first contract ought to stand; because lawyers make a great difference between the pactions of sovereigns and these of private parties: For as to princes they agree, that *prima illius concessio* ought always to prevail; and if he makes a second, *præsumitur deceptus vel subreptione vel obreptione*; seeing *pacta servare est juris gentium, et fidem fallere est in omnibus grave, sed maxime in principe.*

ANSWERED,---This contract was only entered into by the Queen Regent, and never took effect; and Edinburgh got the first complete right by infestment, and had it long before by donation of the ports of Leith to them by King Robert's charter, and sundry agreements with the Logans, then lairds of Restalrig. Then Leith at least pleaded the privilege of a burgh of barony, as they are enlarged by the Act of Parliament 1672, and to have a communication of trade conform to the Act 1693; and that their houses might not be stented, seeing part of them held of the barony, others were church-lands belonging to St Anthony's Chapel and other ecclesiastic benefices.

ANSWERED,---The privileges given by law to burghs of baronies and regalities are in favours of the masters of the ground, so they must enjoy it in no other ways than he pleases to allow them; and, Edinburgh being barons to Leith, they must be content with what privileges they allow them. And the Act 1693, anent communication of trade, expressly excepts the port-towns of royal burghs, such as Leith is to Edinburgh; and their houses, not being stented with the shire, must pay a proportion of the good Town's taxation, as they have always done hitherto; and must not reclaim against their superiors, unless they can say they are unequally or exorbitantly cessed. See a long debate marked by Dury, *4th February*, and *11th March* 1630, betwixt thir parties, upon a bond of servitude given by the *Lairds of Restalrig* in 1398, and anent the privilege of girdling victual in Leith. This contest for the liberties of Leith has been often started, and was managed by Alexander Hay, and then by James Riddle, in my time, but not with the success they expected. See the famous debate in

the declarator raised by the *Town of Stirling* against the *Towns of Falkirk and Kilsyth*, for debarring them from trade, set down at large, 17th January and 25th June 1672, and which occasioned the Act of Parliament that same year, regulating the marches between burghs of barony and regality on the one side, and burghs royal on the other.

It was much urged for the inhabitants of Leith, that the privileges of Edinburgh, whereby they debarred Leith from trade, were all founded on the ancient laws and Acts of Parliament, whereby trade was confined to royal burghs, because they bore the sixth part of all public taxations; but now, since 1672, the Parliament growing wiser, and diffusing the trade more extensively to all the lieges, as to some particulars, all the former restraints lying upon Leith must fall off with the rescission and alteration of these laws, as the foundation whereon they were built.

ANSWERED for the Town of Edinburgh,—Though these Acts were indeed ampliative of the extent of trade, to make it flourish, yet they could never take away private rights, nor prejudice the barons' privileges who procured the same, and were mainly considered in the granting thereof; and though, in general, the barony's trade is the master's advantage, yet it is not so between Leith and Edinburgh; and whatever burghs of barony may plead, who have got special charters and concessions of choosing their own magistrates, (as the Wemyss and sundry others,) yet Leith can show no such thing; and to give them more privileges, were to set up their dependencies to draw away the substance from Edinburgh, and turn it to a heap of stones, to increase Leith, which is turned too big already for its head, by the mere favour, neighbourhood, and benevolence of Edinburgh.

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*February 9.*—The Lords advised the Town of Leith's declarator against the Town of Edinburgh, mentioned 22d January 1697; and first proceeded to that point, if the Acts of Parliament in 1672 and 1690, enlarging trade to all the lieges, did annul or retrench the Town of Edinburgh's right, as superiors and barons of Leith, established by a tract of rights, both conventional and legal, past memory, before the date of these laws; or if they restrained or took away the barons' power; especially seeing the Act 1693, communicating trade, excepts the port towns of dry burghs, such as Leith is to Edinburgh. The Lords found these Acts did not take away the Town of Edinburgh's prior right over Leith; without dipping on the case of other burghs of barony, which certainly have right to trade.

The next question was,—How far the Town of Edinburgh could lay a proportion of their stent upon Leith. The Lords found Edinburgh had right and authority, by many Acts, and particularly the Act 1661, anent the excise, where Leith is cast in to bear burden with Edinburgh.

The *third* point was,—If they could be cessed for their houses, or only for the area and ground whereon they stood, as Leith contended. It was found the *ædificia* behoved to pay, as well as the area. Then the proportion fell to be considered; and it was proposed by some to try, before answer, what cess Dalkeith, Tranent, Musselburgh, and other burghs of barony in Lothian paid for their houses. But the Lords refused this, and only allowed the Town of Leith to give in a condescendence of such of their inhabitants as they thought over-stented, and the Lords would redress the inequality. Some were for a fixed standard of so

much on the £100 of rent, which the Town should be discharged to exceed. But this was not thought practicable, seeing cess varies, and the houses may increase or decay.

The Town of Leith appealed to the Parliament, and some demurred, because it was not within ten days after pronouncing the interlocutor; but at last it was admitted.

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1697. *February 9.* CHRISTIAN ORD *against* AGNES INNES, Relict of Lawrence Ord.

IN a removing, pursued by Christian Ord against Agnes Innes, Relict of Laurence Ord; ALLEGED,---I cannot remove, because I am provided to the life-rent of all the conquest during the marriage; and *ita est*, I offer to prove these houses were acquired *stante matrimonio*. ANSWERED, *1mo.* No personal obligation can defend against a removing. *2do.* It can be made appear this was no true conquest, but he lifted his other sums, and built thir houses and stables with them. REPLIED,---You, as heir to the granter of my obligation, cannot quarrel it; for *quem de evictione tenet actio eundem agentem repellit exceptio; et frustra petis quod mox es restituta.*

The Lords found the Relict ought to remove, unless she found caution for the rents, in case she succumbed; and this, in regard the heir offered her caution, if she, *in eventu*, were found to have right to the life-rent of these houses as conquest.

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1697. *February 10.* M'KENZIE of ROSEHAUGH and CREDITORS of CUNYNGHAM of AUCHINHARVEY *against* ADAM CAMPBELL of GARGUNNOCK.

[See the prior part of the Report of this Case, Dictionary, page 16099.]

HALCRAIG reported M'Kenzie of Rosehaugh, and other Creditors of Cunyng- ham of Auchinharvey, against Mr Adam Campbell of Gargunnoch, (mentioned 10th December 1696,) for reducing a disposition by Auchinharvey to him, as being *inter conjunctas personas*, (brothers-in-law,) without a full adequate price, and necessary preceding cause.

ANSWERED,---This does not fall under the compass of the Act of Parliament 1621; for the disposition is granted when he was in full capacity, there being no diligence then against him at the instance of his creditors, to disable him. And as to the price, it is so competent, that he is content to quit, if any will redeem him. And as to the words of the Act of Parliament, "necessary cause;" this must not be so interpreted as to presuppose a prior antecedent cause, on which he might have been compelled to grant the disposition; but only that it was so far from being gratuitous and voluntary, that it was for payment of his just and lawful debts.

The Lords found his disposition did not fall under that clause of the Act of Parliament.

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