

1694. *January 19.*DUKE OF HAMILTON, and The BAILIE of the Town and Regality of Borrowstownness, *against* The TRADES.

No 20.
Who liable
to be stented
in burghs of
regality?

ARNISTON reported the Duke of Hamilton, and the Bailie of the town and regality of Borrowstownness, against the Trades there. The question was, if, upon the new act of Parliament 1693, giving a communication of trade to burghs of regalities, and baronies, according as they should agree with Mr John Buchan, only merchant-traders in export and import are to be stented, or if all the mechanics, such as tailors, shoemakers, &c. must also bear a proportional share in the tax; who *alleged* they were not concerned, seeing they had no benefit by the privilege of trade that was not communicated. *Answered*, It is the foreign trade that makes the place flourish; and if it were not for that resort and concourse of people, these tradesmen would not be employed, nor find encouragement there; and so they must bear a share of the burden, in the same way as tradesmen do in royal burghs. THE LORDS having read the last clause of that act of Parliament, ordaining all traders and others having benefit thereby to be stented, found the word 'others' was not merely exegetick and superfluous, and consequently it could signify none, nor be intended for any but tradesmen, and so found them liable, but not in an equal share with merchants, their concern being less and more remote; but found this would not extend to inhabitants who had no trade, but lived on their own; and that it was not a ground to make them liable, that by the quick return of trade you get things cheaper, that being only an accidental advantage.

Fountainhall, v. 1. p. 594.

1704. *December 13.* LUMISDEN *against* ROBERTSON.

No 21.
Found in conformity to
Elshields against Elshields, No
16. p. 13070.

LORD PHILIPHAUGH reported Dame Anna Lumisden, Lady Valleyfield, *contra* Robertson of Gladney, and the Creditors of that estate. The Lady, in her contract of marriage with Preston of Valleyfield, is provided and infeft in an annualrent of 2000 merks out of that estate; but the clause does not express whether this annualrent, or liferent annuity, should be free of cess and other public burdens, or not. The Lady pursuing a poiding of the ground, it was *Objected*, She must bear a proportional share of the cess and other public burdens with the rest of the estate, there being no provision in the contract, specially exeeming her, as uses to be when the same is intended by the parties-contractors; especially considering these annualrents are grievous burdens, and have been the occasion of sinking many estates in Scotland, and, by the 3d. act, Parliament 1646, such liferents were made subject to public burdens; and though that Parliament and its acts be rescinded by the great act rescissory in

1661, yet the equity of it was so strong, that, by the act of convention in 1667, it is revived, and that clause is carried along in all the subsequent acts of supply in 1672, 1678, 1681, 1685, &c. In the next place, the LORDS have determined accordingly, on the 18th of June 1663, Fleming, No 35. p. 8273.; 22d January 1668, Douglas, No 9. p. 13066.; 22d February 1670, the Countess of Cassilis, No 5. p. 2257.; and 22d July 1691, Ramsay, (*see APPENDIX.*); where such annualrents are made liable to public burdens. *Answered for the Lady,* That it has been always looked upon as undoubted, that these annualrents shall be free, unless there be a clause adjected declaring them liable, which all provident parties do. And the act of the convention 1667 may impose cess, but had no power to make binding laws; and the decisions have been in the case of liferent-localities, which it is not denied but they are liable, and not in the case of annuities as this is; and there is no more reason to make these liable to public burdens, than the annualrents of personal securities by bonds. *2do,* The husband's heir is bound in payment to her as well not infest as infest; and, by a clause of absolute warrandice, is obliged to free her of all perils, burdens, and inconveniencies whatsoever, and the word burdens must comprehend cess. *Replied,* That the decisions are plain, burdening all annualrents, unless the granter be expressly obliged to relieve them; and the clause of warrandice is in the common style, and can only exeem from teind and feu duties, but not from cess. THE LORDS found the Lady's liferent-annuity must bear a share of the public burdens as it shall be proportioned with the rest of the barony, out of which it is upliftable. Some thought this decision might take place where the liferent was exorbitant, and the apparent heir had little; but the LORDS made it general, where it is not declared free.

Fol. Dic. v. 2. p. 291. Fountainhall, v. 2. p. 246.

1711. July 13. JAMES Duke of MONTROSE *against* The FEUARS of Kilpatrick.

FIVE chalder and two bolls of meal reserved by King Robert I. in the feu granted by him of the lordship of Kilpatrick, being in King James VI's time made payable to the castle of Dunbarton for the subsistence of the garrison, and called the watch-meal;—in a process for payment thereof, at the Duke of Montrose's interest, (who for onerous causes procured the said feu-duty or watch-meal to be dissolved from the Crown in his favour) against the feuars of Kilpatrick, the LORDS found, That the said watch-meal, being a feu-duty payable out of the Queen's property, was not liable to cess; in respect ever since the Excise was annexed to the Crown, cess is never imposed but by a voluntary offer made by the subjects to the sovereign.

Fol. Dic. v. 2. p. 291. Forbes, p. 525.

No 22.

Feu-duty reserved by a Sovereign, in a charter of lands of his property not liable to cess after dissolution thereof from the Crown to a subject.