No 24. tion of the Magistrates; and unless it can be made appear, that they have been guilty of a gross abuse of power, the Court of Session cannot interpose.

"THE LORDS refused to give relief, and adhered to their former interlocutors."

Reporter, *Kames.* Act. *Lockhart, Ferguson.* Alt. *Miller, And. Pringle.* Clerk, *Gibson.*
D. R. *Fol. Dic. v.* 4. *p.* 193. *Fac. Col. No* 185. *p.* 329.

*** Lord Kames's report of this case is No 43. p. 1900, *voce* BURGH ROYAL.

1789. *February* 6.

EARL of WEMYSS, and Others, Inhabitants of Canongate, *against* The MAGISTRATES of CANONGATE.

No 25.
Burgesses or traders, and not private inhabitants of towns, liable to the burden of the local quartering of soldiers.—But this has since been altered.

THE Magistrates of Canongate, in 1786, passed a sentence, "finding, That the inhabitants of that borough were all indiscriminately liable to the charge of the local quartering of soldiers; and ordering accordingly, that they should be quartered on the whole inhabitants without distinction;" whereas formerly the burgesses and traders only had been subjected to that burden. For about two years the imposition was so far submitted to, that the other inhabitants paid a tax by way of commutation for it. At length a suspension of the Magistrates' order was obtained by them, and an action of declarator of exemption instituted, in which evidence was produced, that the usage of every considerable town in Scotland, where soldiers were locally quartered, had always been to billet them on burgesses exclusively of the rest of the inhabitants. The pursuers

Pleaded; Those only are liable to the charge of thus quartering soldiers, who are bound to perform the service of watching and warding within burgh. This description applies to burgesses alone, who, when they submit to the former inconvenience in favour of those who relieve them from the latter, should not repine at paying so small a price for so great a benefit.

The common law protects every man in the sacred retirement of his own house, which is never to be violated by the intrusion of any class of people. Nor is the imposition in question warranted by the statute-law. The quartering of soldiers is for the first time mentioned in the act of convention of 1667. In order to guard against the abuses which might thence arise, several posterior acts of Parliament were framed, viz. 1681, c. 3.; 1690, c. 6.; 1693, c. 4.; 1695, c. 33.; 1696, c. 23.; and, in particular, by the statute of 1698, c. 9, it was enacted, "That in time of peace within the kingdom, soldiers, in their local quarters, should only be quartered by those to whom the direction thereof appertains, in boroughs royal or of regality, or the most capable market towns within the shires where their quartering should be ordered, and that they should not be quartered upon tenants in dispersed onsteads in the country, upon pretence either of stubble-quarters, or of any other cause whatsomever." But as in none of these acts of Parliament is the burden laid on the occasional

or unconnected inhabitants of towns, so by the universal usage of Scotland, it is confined to the constituent members or burgesses; and, by that usage, the meaning of those enactments, so far as indefinite, is to be determined. Nay, by such immemorial custom, even contrary enactments would have been repealed or abrogated; Erskine, b. 1. tit. 1. § 45. The last-mentioned statute of 1698, corrected an abuse committed in the country, under the pretence no doubt of the necessity of resorting thither for provender to the army; but it surely indicates no extension of the burden beyond its proper limits in towns. No 25.

Answered; If a public burden is to be imposed, it were hard, that those only who are most able to bear it should be exempted, to increase the load of such as are least able. The words of the statute of 1698 are general, admitting no exception, but that singly in behalf of tenants in dispersed onsteads "in the country." Nor could any posterior practice abrogate the law. For the annual mutiny-act declares that the quartering of soldiers shall be regulated "by the laws of Scotland which were in force at the time of the Union.

The Lord Ordinary reported the cause, when

The COURT considered the plea of the pursuers as strongly founded in the usage; and it was observed, that prior to the act 1698, there must have been the same usage as afterwards, seeing there was nothing in that statute to introduce a change.

THE LORDS decerned in the declaratory action, "finding the pursuers exempted from the charge in question."

Reporter, *Lord Alva.* Act. *Rolland.* Alt. *Lord Alvocate, A. Ferguson, Hope.* Clerk, *Home.*

Fol. Dic. v. 4. *p.* 193. *Fac. Col. No* 58. *p.* 103.

1794. *February* 7. MILL *against* SKENE.

No 26.

THE lands of Waterston were separated from the barony of Fearn in 1713, in consequence of a minute of sale, by which the purchaser became bound to relieve the seller from a proportion of the cess. In 1722, these lands were purchased, and have ever since been possessed by the family of Skene of Skene. In 1766, the predecessor of Mr Mill purchased the barony of Fearn; and the latter, in 1792, brought an action against Skene, stating, that the valuation of Waterston had never been disjoined from that of Fearn, the proprietor of the latter having always paid the same quota of public burdens since, as before the sale; and concluding for repetition of bygones, and relief as to future payments. Skene, in defence, pleaded the negative prescription, and *urged*, That as a charter and sasine forty years back would have precluded the pursuer from claiming the property of the lands, it must equally preclude his claim to the