1672. *January* 18, and *June*. The TOWN of STIRLING *against* the UNFREEMEN in FALKIRK and KILSITH.

THE Town of Stirling having charged the unfreemen within the Towns of Falkirk and Kilsith, to find sufficient caution that they shall desist from trading, conform to the act of Parliament in 1633; which charges they suspended and found caution; now they are pursued for contravention of the acts of Parliament, and the caution found by them, because they export, import, and retail, which are the solid privileges of the Royal Burghs. At the calling of this action it was declared, that Stirling and the Burghs Royal did insist only *pro loco et tempore* to have them debarred from exporting and importing.

ALLEGED, 1*mo*, The summonses are ill executed, being only on six days, whereas they should have been on twenty-one. 2*do*, They should have been continued. 3*tio*, There is no active title produced, because Stirling's infeftment and erection is not produced. 4*to*, Falkirk is not within their freedom, and so they cannot charge them to find caution. 5*to*, My Lord Callender, as lord of the regality there, should be called. 6*to*, The Lords cannot meddle with the limits between burghs royal and burghs of regality and barony, at least they have waved the same hitherto. 7*to*, They are content, of their own consent, that import and export be appropriated to burghs royal, providing retailing (which cannot be denied for the conveniency of travellers and others,) be permitted to them. *Vide infra*, *No.* 341, [15*th June*, 1672.] *Vide* Dury, 4*th February*, 1630, *Edinburgh* against *Leith*.

To thir it was ANSWERED,—That it needed not be on twenty-one days, because it was both privileged and accessory to the act of Parliament, and their acts of caution, and to a decreet of suspension in 1644. To the second, that it was continued. To the third, no necessity to produce Stirling's infeftment, *quia notorium, quod non debet probari sed tantum allegari*. To the fourth, the agent for the haill burghs concurred. 2*do*, Any of the royal burghs may pursue unfreemen, though in Caithnes, especially when they contravene the acts of Parliament. To the fifth, 1*mo*, Not verified nor made constant that it is a regality. 2*do*, None need to be called but the contraveners, who cannot pretend to be freemen. To the sixth and seventh, oppone the act of Parliament, 1633, and refer them to the Lords.

The Lords repelled all thir dilators, and ordained the regalities to be heard *in causa*, why they should be discharged to export or import; especially since they bear burden in all taxations, and unfreemen bear none.

It was pretended that King Charles, by a letter, had desired the Lords to leave the redding of these marches to the Parliament. ANSWERED,—this being *mandatum* it expired *morte mandatoris*. *Advocates' MS. No.* 303, *folio* 125.

FOUNTAINHALL'S PLEADING FOR THE TOWN OF STIRLING.

1672. *June* 25.—*Presente Regio Commissionario.*

MY LORD COMMISSIONER,

May it please your Grace; what happiness and cheerfulness the eminent and most eloquent of all the apostles, St. Paul, expresses when he is put to plead his cause before

Festus and Agrippa; because the one had long been a judge to his nation, and the other was expert in all the customs and questions which were among the Jews: the same gladness possesses the town of Stirling, and with them the whole royal burghs, that they are to plead in behalf of their privileges this day before your Grace, the great patron and conservator of them. My Lord, if they should deduce them at large, they are afraid they shall consume more time than is permitted for all the advocates to speak in this case. My Lord, be pleased to know that the town of Stirling finding a sensible decay in their trade, through the unjust encroachments made upon their privileges by some unfree traffickers within the town of Falkirk; they caused charge them to find sufficient caution in your Lordships' books, that they should desist and cease from using the privileges only granted to the royal burghs: which charge, though they did obey, and accordingly found caution, yet their contraventions since have been so frequent, so grossly palpable and prejudicial, that the town of Stirling could not be so far wanting to their own interest as to dissemble the same any longer; especially considering that these actings strike at the throat, and tend to the prostitution, yea the final subversion not only of their liberties, but of those of the whole regal burghs in Scotland. Upon this principle of pure and absolute necessity, the town of Stirling, with concourse of his Majesty's advocate and the agent for the burghs, have raised a declarator of contravention against the said persons, for breaking not only the acts of caution found by them, but also the acts of Parliament, whereunto the same are accessary: and not only the acts of Parliament, but likewise a decreet of suspension recovered *inter easdem personas* in 1644; with a declaratory clause, that exporting, importing, and retailing, are the privileges of the royal burghs privatively to all others. At the calling of which action the pursuers were so well natured, and so complying with that which is esteemed by some the public good of the kingdom, that they declared, they insisted not *hoc loco* for tapping or retailing, but allenarly on export and import. This generosity was so far from producing the effects that might rationally have been expected from the defenders, that they now begin to controvert these rights, which, if the burghs royal had *mordicus* adhered to a declarator of their haill privileges, *in tota latitudine*, would never have suffered the least debate; I mean export and import. I confess they want not shadows of pretences, why these two important privileges should not be wholly enhanced or monopolised by the burghs regal; but I hope to make it appear that they are but colours, and no more. O, say the patrons of regalities, the laws whereupon the pursuers found their privileges, are contrary to that natural liberty and freedom wherewith every man is invested, every man is doted, so soon as he is born; and, therefore, are unjust, exorbitant, and null. That, by the law of nature, and primitive law of nations, each man has an undoubted, uncontrollable, unlimited power and faculty of commerce or trading with whom, where, and in what manner he pleases. That the countries where trade has received its greatest dimensions and lustre, its most glorious and eminent encouragements, viz. Holland, (which we may propose for a pattern in this, though in nothing else,) the footsteps of the law of nature are closely followed; every freister and milkmaid having freedom to trade, and which is known to all, they actually do it: that he, who has written The Interest of Holland, a book so much cried up by many, lays down this for a fundamental; that by what degrees trade suffers restraint, by the same very steps does it suffer diminution; that every law anent trade, is an impediment to trade; and where it is most unbounded and most free,

there it will flourish most. That hard at all the gates of the city of London, are unfree merchants and tradesmen, who, in spite of all the opposition made by the inhabitants of London, bruik now peaceably their privileges, so profound a root, so deep an *impreza* has nature left of this her free gift upon the spirit of all men. That the acts of Parliament, introduced in favours of the pursuers, are destitute of those two great pillars, whereon all laws (especially such as retrench our natural liberty) should be founded, viz. Justice and Equity. That *ratio est anima legis*:* that for want of reasonableness and possibility, (two qualities that must be found in every act, else it is not a law, as wanting its essential parts,) they have long ago sunk and lain buried under the load of their own ruins. That the regalities have prescribed immunity from that slavery wherein they were blindfolded by the pursuers; that they have prescribed a communication, and an equal right to their privileges now under debate: that the laws are in desuetude which gave the royal burghs these liberties; and not only in desuetude, (which the best lawyers make to be induced *per non observantiam decem annorum*,) but also a contrary observance and consuetude have prevailed against them. That observance is as essential a requisite to a law, as sanction, promulgation, or the like; yea more necessary than any of these, since without observance it is but a dead letter. That there is a great difference to be made between a law that never attained observance, and a law that once was observed, but has long lain in desuetude; the second is, indeed, a law, because it had once a perfect and a consummate being; the first is no better than an embryo, and deserves not the name of a law; and of this kind be the acts founded upon by the pursuers. That the regalities have possessed all these privileges immemorially. That all this has befallen the burghs royal, they not conniving, but using all the imaginable courses in the world to vindicate their liberties from injurious oblivion, keeping them from falling headlong into not observance, and reviving them from time to time; yet such is the invincible strength of nature and its dictates against monopolies, that all superstructures disproportionate to the foundation must bow and crumble to atoms before her. That the highest the pursuers can screw their grants, as to time, is the reign of King James the Third, *in anno* 1466; that they took no effect all his reign; therefore they procured a new act and ratification from King James the Fourth, in 1503, cap. 83: which acts not being able to do the turn, their breach lies over unquestioned till King James the Sixth's days, who sets them on foot again, but still *irrito conatu*. Does he not declare by his 152nd act of his 12th Parliament in 1592, that the said privileges were not, at that present, yea never were, in use and observance at any time of before? That none of these acts speak *totidem verbis* of exporting and importing, but mainly of not selling wax, wine, silks, spiceries, wood, wadde, &c.; a thing so ridiculous and so grossly choaking all public conveniency and utility, and whereof we cannot say it was exploded and banished, since it never once took place. That at the time when these privileges were first conferred, trade was in its infancy; merchants were few, and merchandizing was a mystery. Have they not been mighty expert in this trade, when none durst sail betwixt St. Jude's day and Candlemas! See act 14. in 1466. Our estates were like gropers in the dark, not knowing whereon to fix; and if they in those ignorant times, participating more of barbarity than of any thing

* *Sæpe in judiciis, quoad credebat conjectura prodesse, experimento invenitur inutile. Novella* 111, *in præfatione.*

else, mistook the knack, and supposed they had hit the head when it may be was but the thigh, shall we doat so far upon antiquity as to forego our visible benefit, and support an inconvenient and intolerable custom? But we shall be charitable, (say they,) and suppose what they did was consonant with the exigencies of those times.* Yet who is ignorant how changeable and inconstant the *ragioni di stato* and interests of kingdoms are? What was suitable and fit twenty years ago may but quadrate very sorrily now: the stating of such privileges in an incorporation or company of merchants at that time might not want its own reasons, viz. that they, by unfolding the secrets of trade, might bring it to a consistency, and make it intelligible to every one; but now find no place. Whatever may be said of other laws, yet it holds firm in privileges, (which were called by the Romans *leges privæ seu privatæ,)* that *cessante eorum causa, cessare debet et ipsum privilegium:* that they make a great difference between laws and privileges; that privileges *ipso facto* they are abused, they become void and null: that whatever reason *might* have been for moving the legislator to confer these grants then, the same not only falls short now, but the contrary reason, as far more pregnant, has elided it and succeeded in its place: that privileges given by a prince ought to continue no longer than he sees cause. † That if a hive of bees from whom honey and substance was expected, prove drones, then they should be driven out, and that protection and countenance transferred for warming and encouraging of others. That it is not only a caveat of the Roman emperors, but also of his Majesty's most wise and prudent predecessors the kings of Scotland, for their judges not to regard their rescripts, impetrated and elicited by private parties, either obrepticiously or surrepticiously, *si sint contra jus vel utilitatem publicam:* that the rescripts in favours of the royal burghs are of this kind. It is against all reason and natural understanding that only Lauder, in the whole sheriffdom of Berwick, shall, as a burgh royal, have the sole privilege of import, export, and retailing, and these to be denied to Eimouth: seeing the one *per rerum naturam* cannot use these privileges, and truly *de facto* there is nothing for the accommodation of the lieges to be had in it; whereas God Almighty, by the natural situation of the other, has destined it for the equal and easy distribution of all necessary commodities to the adjacent country: and yet this providence must be rendered of no use to the inhabitants of that country, because, forsooth, it would break the ease, not of those famous and worshipful men of whom King James the Third speaks, but of a multitude of randy beggars; with which size of cattle too, too many of our royal burghs are now stored. Is this not a most impudent perverting of nature? a most ungrateful turning upside down of her favours? Can there be a more effronted rejecting of her beneficial dispensations than to discharge the use of them? It is well known what unspeakable advantage the endowing of a town in the isle of the Lewes ‡ with royal privileges would have brought to the haill nation; yet the royal burghs, because this would have enlarged that trade whereof then they were the sole possessors, by the help of L.100,000 they got the same dashed. The laws whereon the pursuers found were reputed so hugely unjust, that by universal con-

* *Vide Plinium, Epistolarum Lib.* 1, *Epist.* 20, *in medio.*

† Yet see *Hippolytus de Marsiliis sing.* 531.

‡ This was my Lord Seaforth's design in building Stronway there, *in anno* 1628 and 1629. Mr. John Hay went to court about it. Vide the 263d act in 1597. See the Town of Edinburgh's Council Books the said years, viz. 1628 and 1629.

sent and acclammation they were not only suffered to pass in desuetude, but a contrary, impetuous, vigorous, and fresh custom succeeded. That none controvert but *consuetudo habet vim legis : inveterata consuetudo non immerito pro lege custoditur : leges non solum suffragio legislatorum, sed etiam tacito consensu omnium per desuetudinem, abrogantur: quæ per multos annos uniformiter observata sunt, tanquam tacita civium conventio, recte pro jure et lege servantur : consuetudo præcedens, et ratio quæ eam suasit, omnino custodienda est: cum multis similibus.** Yea the regalities and baronies are founded not only in immemorial possession, but also in express acts of Parliament, viz. the act of annexation of Kirklands to the crown, being the 29th act in 1587; it bears one express clause that those burghs of regality and barony which held formerly of bishops and abbots, and hold now of his sacred majesty, shall continue their use and wont in trading and merchandizing as formerly, shall choose burgesses, elect magistrates, &c. and shall be in no whit endommaged or deteriorated by the alteration. That the unfree burghs were *in anno* 1607, in the open and avowed use of keeping booths, of buying and selling of merchandize, &c. appears from the 6th act of the Parliament holden that year. That his majesty, as he is the fountain of all nobility, so is he the dispenser of privileges, and by the 25th act of Parliament in 1663, the sole disposer of all trade *jure coronæ :* and what privileges the royal burghs claim as due to them, the lords of the regalities have obtained a gift of the same (they are taken word for word off the burghs their charter of erection,) from his majesty, † *ex certa scientia et cum summa causæ cognitione :* and therefore, both standing infeft therein, and being *pares*, the royal burghs can never question the same, because *privilegiatus contra privilegiatum non utitur privilegio.* That it merited consideration how the pursuers, by their own concessions, were the sixth part of the kingdom, so the other five parts are all defenders; and shall there be so little proportion (make it either arithmetical or geometrical as you please,) amongst us as to submit and expose five parts of the kingdom to the lust of the sixth part, to make them all languish to fatten and cram it? We know what diseases follow when the liver grows too big for the body. What reason doth it bear, that an understanding man, well versed in all the points of foreign trade, and who might be very useful, shall be debarred the exercise of merchandizing, because forsooth he is not the son of a burgess, or has not married a burgess's daughter, or has not served his apprenticeship, or has not paid the town and dean of guild's dues, or the like? and to the door they will bolt him, for no other reason but because he is a greater master of his trade than they. What shadow of reason can be found for veiling this ignominy, that in his majesty's great consistory and council there should be such a deluge of mean-spirited persons, slaves to one grandee or other, who can pretend to nothing above nonsense, and yet shall have a vote as well as your grace upon the lives, the reputations, and estates of the greatest persons in the kingdom? Were there not many of the burghs that procured themselves erected, solely because they were oppressed by other burghs; and are they not now so poor and so contemptible that they are begging to be scraped out of the roll, and made free of burden? Who can defend the acts of Parliament from an

* *L.* 32 *et seq. D. de Legibus et Senatus-consultis; toto T. C. Quæ sit longa consuetudo. Vide infra, numero* 387, [*7th February* 1673,] F. Kinloch against Lord Abotshall, in the duply, triply, &c.

† *Vide* Act III. in the Parliament 1587.

unpardonable oversight, (if it may not rather be called a material injustice,) in giving power to such fellows to sit in their own chamber, to erect a court in their own disturbed brain, to give forth decreets in their own favours, and then summarily charge the greatest or the best in the nation, (as their malice shall prompt them,) to find sufficient caution to them? and not only so, but to authorise them (oh strange !) in searching for unfree goods wherever they suspect the same, (of which also they are made judges ;) by which means noblemen's and gentlemen's houses may be rifled, at least disturbed, and have no security why their beds and very secretest recesses may not be pried into for commodities. To take away all cause of clamour from the burghs, as though they bore all the burden, (viz. the sixth part of all the taxations imposed,) and the unfree traders eated the sweat, they offer to bear a proportional part thereof, conform to their trade, though they may justly allege they pay to their superiors upon that account already. O how wonderful effects doth the bright and radiant beams of the law of nature work upon the spirits of men! How infallibly doth it guide those who follow its dictates! How amiably consonant is she ever to herself ! It is now 140 years since the first erection of the College of Justice: is it not a strange matter, that during all that space the burghs royal have never been able to get the Lords their authority interposed to their privileges ? If there was not a favourable juncto at one time, why, in so long a tract, did not one opportunity, one occasion, offer, of a well-sitting Sheriff; especially considering that such a decision could have safely palliated itself under abundance of written law, that it would have been *secundum leges regni, secundum allegata et probata?* Surely no reason can be assigned for this but the monstrous enormity and inequality of these grants, choaking all common practice and utility ; which deformity and iniquity have ever so affected the Lords, that they have perpetually subtracted their concourse. Beyond all peradventure ye would all condemn that for a most unlucky and unfavourable action, that, during the interval above mentioned, (viz. of 140 years,) though lying at all advantages, and master of the time when to table it, should never get one leading interlocutor ; yet such is the pursuit now in hand. Can there be any thing more absurd than to say that it shall not be leasum for a gentleman, or any other not a burgess of some free burgh, to bring his cows, his corns, his meal, his linen cloth, or the other product and manufacture of the country, and to sell them at the best avail he can, though it be to unfreemen ? shall these be declared staple goods, and only vendible to and by members of burghs royal, who shall combine together, and put what unworthy price they please upon them, else they lie in the maker's hands, (none else having power to buy them, or if they do, it is upon their hazard when they venture to retail them ;) and when they have by thir unjust means got in all these commodities, then they sell them out to the lieges at intolerable and exorbitant gain, which they know must be given them, since no others (though they could) dare vend these commodities ? Do they not drain the country of money, take it abroad, and like Solomon's merchants, bring us home apes and baubles in place thereof? do they not too much foster and obstetricate the never so much increasing luxury and prodigality of this nation? And shall thir conspiracies, monopolies, and masterful oppressions, whereby they grind the face of the people, be any longer established and countenanced by law among us ? That the pursuers their decreet of suspension obtained in 1644, militates nothing against the defenders ; for though it finds the letters orderly proceeded *ad hunc effectum,*

that the defenders should find caution, yet it expressly reserves the interests of regalities, whereon it is declared the defenders shall be heard whenever any special contravention shall be pursued against them; so that, notwithstanding of that decreet, their cause stands as entire and unprejudged as it did before that time.

There resteth only one idol of the pursuers to be beat down and knocked on the head, that is, the act 24 of the Parliament 1633; which will not cost us much pains, seeing a due and serious reflection upon the premised discourse will blunt its edge to every sober unprejudicated person.

It would only be remembered how it was stolen through *viis et modis*, Sir Jo. Hay, once town clerk of Edinburgh, being then clerk-register: that in effect it is only a private act, and should truly have been no where save amongst the unprinted ratifications: that it falls under the act *salvo jure*, and must receive interpretation and restriction from it *in quantum lædit jus tertii*; that it ratifieth only laws which in effect never came to the consistency of laws, but like an untimely embryo never saw the sun to beautify and pave them with a *viridis observantia*, but were instantly choaked with contrary observance, and were not able to vindicate themselves from injuries, (as all our laws truly touched by our sceptre and thistle will do; *nemo me impune lacesset.*) Shall we contend any longer for that law which is so far from laying any just claim to that noble and high-born epithet of being *munus et inventum Dei*,* that it evacuates and controuls those liberties and providential conveniences which the most wise and good God has bestowed both on ourselves and our country? that it deserves better the name of *communis reipublicæ dissolutio* than *sponsio*; rather the name of the bane of the commonwealth than the bond, (which though is an essential requisite for every good law.) Why then shall we weary ourselves any longer, and strive to uphold a ruinous fabric; strive to infuse life and power into laws which (do what we like) will never absolve, nor condemn, nor exert any other the lively acts of a true law?† Were not this to go about to wash a blackamoor white, whether he would or not? That act 1633, being only a ratification, *nihil novi juris tribuit*: ratifying acts which we have shown to be null, itself falls also to be null; *quia non ens nequit ratificari.* Is it not the voice of nature (whereunto all the laws superadded since do succenturiate,) that *communio est mater discordiarum*, that *nemo tenetur vivere in communione?* because (as the Emperors Theodosius and Valentinian say most elegantly,) where a thing is possessed in common, neither of them thinks they have any thing, because they have not all, and each of them is pleased his part perish, providing his neighbour be involved in the same fatality with him; and yet, in spite of all inconveniencies that can follow, we must be driven in unto this prison of communities and associations, otherwise be denied the use of our natural liberties. In respect of all which, it is humbly expected that the Lords will reject the desire of the pursuer's summons, as most unreasonable, and contrary to public utility; or if they be tender in that, then at least to recommend the redding of the marches between the pursuers and defenders to the Parliament presently sitting, who will be the best interpreters of their own acts; and whatever the Lords shall do with it, the defenders shall cordially and heartily acquiesce in their Lordships' justice.

* *L.* 1. *et* 2. *D. de legibus.*

† *L.* 7. *D. de legibus.*

My Lord,

This is the sum of what the defenders ALLEGE in their own behalf; to which, under your Grace's patrociny and favour, I shall endeavour to return a reply. May it please your Grace; though thir defenders would be so unjust as to strip the royal burghs of their privileges, whereto they have right of no younger times than is the erection of this our country into a monarchy; yet we will not follow this bad copy they have casten us, neither will we rob them of their just praise; but on the contrary, ingenuously acknowledge, if this action were to be managed by the beauteous arrangement of words, by the witty and glistening invention of good purposes, smiting, indeed, and astonishing the spirit, but never affecting the heart; if it were to be determined in favours of him who were most adorned with the flowers and gaudy pageantry of eloquence; thir defenders could not miss to gain the cause. But who is he that darkeneth counsel by raising mists and clouds upon the serene firmament of justice? How amiably and invincibly attrayant is the naked and simple face of truth, when once she is manifested and discovered! How naked and ugly do all these false glosses of borrowed eloquence seem before her! How do they evanish, and crawl away out of her sight, as ashamed, and not able to abide or resist her charms. I could repone to their whole defences our numerous acts of Parliament, positively determining and asserting the privileges now controverted, (for if there be any thing positively statuted by our law it is this;) and I might say no more. But this course I will not steer, lest I should seem to put small value upon their discourse, but shall follow it foot for foot, and what appears nervous therein I shall discuss.

The first thing wherewith they begin and with which all alongst they make a great deal of rattling and noise, is, that the privileges of the burghs subvert that natural liberty which every man hath as a man; that they debord from that free and unaccountable power whereby every one may dispose upon his own as he sees fit; that they restrain the nature of dominion, &c. To which it is replied, that this can neither seem strange nor unjust to any sober considerer; there being nothing better known than that there are many rights competent to a man *qua homo in statu meræ naturæ* and abstract from society, which are either denied him, or at least are hemmed in and circumstantiated, when he comes to be considered *qua civis et membrum reipublicæ;* each particular person for the public good having renounced the same of his own consent, and devolved them over upon the city or the chief magistrate thereof. But that I may thoroughly detect the fallacy of this argument, and evidence the defenders their prevarication *in ipso limine*, whereby your Lordships may make a conjecture at the rest, I shall first make it appear it concludes nothing; next *esto*, it did conclude, that then it would prove too much, even by the defenders' own concessions. The first, viz. its non-concludency will be palpable from this one instance: all men by nature are equal; each has a like *jus ad omnia;* we are all naturally free; there is no subordination by nature; none in that state are born to command; none born to obey and serve; every man may avenge the wrongs and injuries done him: *Ergo* the laws of men introducing inequality and subordination, taking away my natural freedom and will, and subjecting me to the dictates of another, retrenching my natural right to every individual, are unjust: *Ergo* the laws sending me to the magistrate for redress of wrongs done to me, who may judge corruptly and and yet may punish me if I seek to right myself at my own hand, are wrongous and exorbitant: *Ergo* the laws introducing policy and magistracy amongst men

are unreasonable, and derogatory to their natural freedom, divesting them of what bountiful nature had given them. Who doth not see the falseness and the dangerousness of such a consequence? and yet it is the same that our defenders make use of. If the law of nature did admit of no correction, but were to be the sole standard of all our actings, what need was there for the positive laws of men? must they all be condemned and cut off at one stroke, because, forsooth, they add and pare from the laws of nature? But, lest we seem to trifle, is not this the proper office and function of the civil law, to correct and supply what that infant law had not foreseen, and to pare off its superfluous redundances? And though the *jus naturæ præceptivum* be unalterable and inviolable, yet it was never once doubted but the *jus naturæ concessivum* or *permissivum* (of which sort this faculty of free trading is) may be infringed, restricted, alienated, or otherwise disposed upon, at the pleasure of every private person, *quoad* his own interest, or of the haill community and society: especially since the equal and innocent state of nature is now changed by the frauds and artifices of evil men, and new necessities are introduced which nature did not provide for, because in her simplicity unknown; therefore in supplement positive laws are superadded.

And if ye will not follow the faith of my raw assertion, (*nam sæpe refert a quo quid dicatur,*) at least ye will trust the authority of Ulpian, who in *L.* 6. *D. de Justitia et jure* tells us, *Jus civile est quod neque in totum a jure naturali vel gentium recedit nec per omnia ei servit; quando igitur aliquid addimus vel detrahimus juri communi, tunc jus civile, id est unius cujusque civitatis proprium, efficimus.* * But next let the *non sequitur* pass, and we will consider it as if it concluded relevantly; and when the defenders shall see the absurdities they have involved themselves in, it is likely they will retract. Their argument will conclude *nimium;* because, upon what foot of account ye condemn any restraint laid on trade, or the fixing of privileges upon particular associations and incorporations of merchants, upon the same very foot of account ye must vote down the East and West India Companies, with the other societies of merchants which are erected with most ample privileges in Amsterdam, London, and those places where the defenders themselves confess trade has arrived at the highest and most transcendant pinnacle; and to whom, as to her beloved darlings, she has laid open all her secrets, not dealing with them as Eleusina did with those that came to visit her, who kept up ever some rarity against the next time. These companies of merchants retrench that uncontrollable, illimited, and unaccountable power of trading, (which may be called nature's birthright,) far more than our burghs royal do, being in effect monopolies of those trades; and yet to all our kennings they are the great *vena porta* that convoys and diffuses those small rivulet veins of wealth and abundant riches through the haill body politic; and trade is their great Diana. So far are they from finding the inconveniences pretended by the defenders, that to restrain that vagrant and unfortunate sort of trading which thir defenders would be at, they have stated most considerable privileges upon incorporations, which are now arrived at that pitch that they are the most effectual sinews both in peace and war; yea we have seen them able to manage a war

* See Jeremy Taylor on this maxim, at page 204, speaking of the law of nature; *Gulielmus Grotius, de principiis juris naturalis, capite 2do, item 7mo,* who cleareth that the concessive law of nature is most subject to mutability.

by themselves. Whatever reasons the defenders shall adduce for salving these companies, and reconciling them to their overture for a free and unbounded trade, the same shall I make use of in behalf of the royal burghs, and they shall conclude as pertinently for the one as for the other.

As for the pretence that all are free to trade in Holland, it is REPLIED, 1*mo*, It is false, in regard we have made it appear that their richest trade is enhanced by some few companies. 2*do*, It is an absolute mistake; for no milkmaid or boor there can trade, otherwise than by giving in their stock to some merchant, who holds them count; and any unfreeman may do the same with us. 3*tio*, *Esto* that were the custom of these places, (which yet we deny,) that is nothing to us, who by express act of Parliament * are ordained to live according to the king's laws and statutes, and not be governed by any particular laws or special privileges of other countries. 4*to*, If what suits at one time may be inconvenient at another, (as the defenders themselves argue,) then the true method of carrying on trade in one kingdom or nation may prove a very crooked immethodical and incomplying rule, a *regula lesbia*, if applied to another. No state but has their own proper maxims of policy and government: some stand by peace, others by war; some by the nobles, others by the traders. It is a great inconsequence and fallacy to argue from the practices of other princes and states, each kingdom having its own proper and individual constitution and reason and interest of state, and accordingly have their municipal laws suitable thereto; so that what is fit in on may be destructive in another. And truly for the disparities betwixt us and Holland in this affair, they are so palpable, that they need no demonstration. By a fatal necessity all must there trade or be artizans, there being no other occupations whereto they can betake themselves. Seeing a number made up of one taken out of each hundred will suffice to labour all the ground they make use of; when they have merchandized and improven their stocks to the greatest advantage, on they must still trade, unless they would have their money lie idle, or give it in to the bank at four per cent; because land they cannot get to buy (were they never so willing to retire,) the country being narrow, and the possessors (for gentlemen I can scarce call them,) not being redacted to any necessity of sale. Trade amongst them has attained to full ripeness and perfection, and therefore needs no encouragement nor privileges; whereas with us none will undergo the hazard and vexation of foreign trade if they be not prompted by the sweet bait of advantage and privileges: with us it is not *necessitatis* but *voluntatis*; we have many other employments, wherein we may spend our time more beneficially; and how soon a merchant acquires any little competency with us, straight he wares it upon land, to shun the scourge of collectors, and to secure him against the snares of hard and discouraging laws; others step indeed upon the stage, but wholly ignorant of the part they are to act; thus trade, for lack of encouragement never comes to be understood by us; it wrestles indeed, but it is never able to get up the head. And what may be the reason of all this? Is it not the severe and envious eye the rest of the kingdom holds over them? Is it not the subtraction of that countenance due to them, the having whereof makes other countries flourish, and the want of it renders us beggars? Is it not the having of separate and distinct interests, that solitary and vagrant trade which can never soar to any thing consi-

* Act 48, Anno 1425.

derable? That which cannot be effectuated by one man's judgment or one man's purse, may be easily compassed if two or three concur together.* Those noble and heroic designs, under the load whereof no single man could be able to stand without being crushed, may be brought about if more undergo the same: *ut quæ non prosint singula multa juvent.* Many hands alleviate a burden. Shall we then dissolve societies, cass ancient privileges, deter all ingenious spirits from becoming the conduit pipes for conveying wealth into our country, for bartering such commodities as we need not with these we need, for keeping up friendly intercourse with our neighbours? Shall we cut off the occasions of all high and noble enterprizes? and all this to satisfy the lust and mistaken advantage of some inconsiderable persons, who, by the levelling they project in trade, would in few years, what through their ignorance, what by their misgovernment, infallibly become beggars. And though this seems very plausible to some in the notion, yet in the practice it would prove very unwieldy, and come nothing up to your expectation, but would indeed destroy all the true measures of trade, as has been shown.

5to, The defenders' overtures as to the matter of trade, copied (as they pretend) off the exactest patterns abroad, might be heard, if our judgment were still free, and if we were debating *de lege condenda vel jure constituendo;* but we are in no such case; the law is already made, the dice is casten, as it was with Cæsar at Rubicon; and if there be any law clearly conceived amongst all our statutes this is it; and so there is no more room left now for debate. The defenders confess, indeed, we have laws on our side: but say they, they are null as destitute of equity; they are gone in desuetude, they are prescribed; a contrary consuetude has prevailed against them; the reason wherefore they were granted has ceased; the first vestige of them was only in the times of King James the Third, and never practised since; that they are rescripts *contra jus et utilitatem publicam, &c.*

To all which it is REPLIED, 1*mo,* If the Emperors have æquiparat the disputing upon their rescripts† and the questioning the merit of those upon whom he has been pleased to confer privileges, with sacrilege, how much more sacrilegious boldness is it to condemn the prince's judgment of injustice? especially when it is not his sentiment alone, but also that of his great counsel and high consistory, and that not at one time (which might be imagined to be a stolen dint) but by such a continued series of consecutive acts that no cause can show the like; their very adversaries, viz. the Lords of Regalities *præsentibus, tacentibus, seu non contradicentibus, imo expresse consentientibus.* Though it be uncivil to inquire into the reasons of laws after they are made, and though a reason ought not to be sought for some old laws,‡ because it cannot be given, and would occasion much uncertainty if it were requisite, yet the laws whereupon the royal burghs found are none of these, but had very convincing reasons at the time of their enacting, (as the defenders seem not to decline;) and which reasons are still in force, as has been shown; as also they being *beneficia divina principis indulgentia proficiscentia,*

* *Quod in multitudinem dividitur, onus insensibile propemodum facit iis qui hoc sustinent. Novella* 38, *in principio.*

† *L.* 5 *C. de diversis rescriptis, L.* 3 *C. de crimine sacrilegii.*

‡ *L.* 20 *et* 21 *D. de legibus.*

quam latissime interpretari debent; l. pen. D. de constitutionibus principum. 2do, As to the allegeance of desuetude, though it has made a great deal of bustling, and has seduced so many, that it is almost become a vulgar error, yet it has no weight; for *primo* the defenders can condescend upon no such acts as can validly infer a desuetude of the said privileges: but next, I positively affirm, that no desuetude can abrogate a law: and that this is *certissimi juris* in our neighbour nation of England, Craig, *Lib.* 1, *Dieg.* 8, *page* 38*th*, tells; who in the following page most solidly proves that no contrary consuetude (*ergo multo minus* a desuetude) is able to repel a written law with us; for says he most elegantly, such a contrary observance ought rather to be called *vetustas erroris* than *consuetudo:* and truly this is no more than what the Emperor Constantine had written to Proculus of before, in *l. 2 C. Quæ sit longa consuetudo: Consuetudinis ususve longævi non vilis authoritas est, verum non usque adeo tui valitura momento ut aut rationem vincat aut legem.* As for the contrary laws adduced by the defenders, especially *l. 32. D. de Legibus, Senatus-consultis, et Longa consuetudine,* which seem to prove a law may be annulled by contrary custom, they be true in laws made under a democracy, but not in the laws of a Prince, which in no sense or rational comprehension can be annulled or rescinded by any other power than that which made them; *ergo,* not by a contrary custom; which is also Doctor Taylor's opinion, *page* 743. The users of this argument would advert that by the same rule the nonconformists may plead the acts made against them and their conventicles to be null, as never having taken effect, as never having been observed, but that they in the contrary have continued their former use and practices. And yet how would he be exploded who would offer to argue in such a manner before your Grace, the great enemy of all such vermin? But if a scruple remain still in the minds of any, as if desuetude or a contrary consuetude were enough with us to repeal a law, I shall refer them to the narrative of the act pardoning penal statutes passed in the Parliament 1612, from which it appears sundry had flattered themselves in that erroneous opinion, that these statutes having been so long neglected without any research, trial, or punishment, the same could noways be put in execution, as turned in desuetude: it is true the said *error communis,* because of the multitude of the delinquents, according to that of the poet, *Quicquid multis peccatur multum est,* * is declared to operate *condonationem et veniam præteritorum,* but it has no strength to introduce a law *pro futuris casibus regulandis.* It is true, in the case of the *Merchants of Edinburgh* against *Sir Walter Seaton,* who in 1664 was studying to revive that 24th act of Parliament made by King James in 1600, for sealing all cloth; it was alleged by the merchants, that the said act was become in desuetude, and so did not bind; but nothing followed upon that debate. *3tio,* As to the allegeance of prescription, the same is most impertinent from the defenders, who are only sorry that the Royal burghs should interrupt them so much in their encroachments. *4to,* As to the allegeance, that the final reasons of those laws and privileges whereon the pursuers found, are long ceased and expired; it is replied, first, that this is already demonstrated to be false, yea, *in anno* 1661, the burghs have a ratification of all their former privileges, though unprinted, yet it shows the sense of that time so late and so near to our own, and that they thought not the reason of that law expired: next, the axiom *Cessante causa finali legis, cessat et legis dispositio,* must be understood *cum grano*

* *Vide* Dury, 16th *January* 1626, *St. Bothans.*

salis ; the cases whereof are learnedly opened by Doctor Taylor page 731, speaking anent the abrogation of human laws. *5to*, As to the allegeance, that the pursuers' laws and privileges owe their first birth to King James the third, and that none of the Princes since, with all their power, has been able to make them observed; this is so gross an anistoresie and mistake in our chronicle, that the defenders (who are known to be well versed in our antiquities,) cannot be ignorant of it; and, therefore, the assertion can bear no other construction than of a wilful clench, at least a transport of blind zeal, making them lessen all that might tend to the reputation of the royal burghs. If there be any thing sacred, ancient, or venerable, in the constitution of the policy of this kingdom, it is the erection of the burghs with the privileges now in question. In our oldest records of written law, viz. the Books of Regiam Majestatem, and Quoniam Attachiamenta, (if that be our law which they contain, whereof Craig doubteth,) we have mention of them. In the Burgh Laws, cap. 18, 22,40, 134, 139, and 140, it is clear that wool, hydes, and other commodities, can only be bought and sold by burgesses; that stallangers, cremars, or dustifuts, in French *Pieds poudreux*, now called chapmen, had no freedom within burgh, except on market days, and for which also they behoved to pay. In the old tractat called The Chamberlaine air, *cap. ultimo Nis. 35 et 63*, amongst the articles of dittay to be inquired into, this is one: If any man not having the liberty of burgh usurp the same to the hurt of the burgh, and if cremars commonly buy and sell within burgh as burgesses, and by whose permission. Amongst the statutes of King William, cap. 35, 36, and 37, there is strict prohibition that none meddle in merchandise, save the merchants residing in burghs; and King David, in his statutes, cap. 32 and 33, ratifies expressly the haill liberties and privileges of the burghs, and wills them to enjoy the same as they were in use to do the time of good peace, and that none presume to oppress them, under the pain of being reputed breakers of the King's peace. If the defenders shall seek to palliate their oversight, by alleging, that James the third was the first of all the Jameses that did any thing in favours of the burghs, and that this was their meaning in the preceding assertion; not even this will they be able to make good: yea, on the contrary, King James the First, in his third Parliament 1425, act 38, declares the *minimum quod sic* of every merchant,* viz. that he have three serplaiths of cloth or the value; *ergo*, in his time there was not a promiscuous liberty of trade to all. Again, James the Second, in his eleventh Parliament, 46th act, declares what shall be the manner and constitution of the secret councils of burghs; and *in anno* 1457, acts 67 and 68, (this 68th act is only made by the clergy, barons, and King, against the burghs,) they provide again that those who sail in merchandise furth of the realm, be able men, of good fame, be freemen of burghs, and indwellers within the same. Could any thing have been more plainly expressed than this? and yet it must be affirmed by our adversaries that the burghs' privileges are but of yesterday, and of King James the Third's coining, as if he, inclining to tyranny, had not weighed the public good when he did grant them. *6to*, As for the allegeance, that the laws whereupon the pursuers found, are contrary to the public utility, the same needs no reply, it having been abundantly refuted already.

As for the pretence that the power of exporting and importing is no-where in the acts of Parliament adduced, *disertis verbis* given to the pursuers, the same is

* See also a privilege granted to merchants by James the first in 1425; (it is unprinted:) and the 117th amongst those printed in Gothic letter.

ridiculous, because 1*mo*, The express and sole power of retailing is given them, which is a far greater privilege than those under debate, *et majus continet sub se minus*. 2*do*, Our ancestors in those days were not curious in their words, as we are now, yet nothing can be better expressed by the equivalent than these two are in the act 1466, "Let none sail or pass in merchandice furth of the realm, but freemen burgesses dwelling within burgh;" there is export: "Let none, save freemen, buy foreign commodities to bring home, except gentlemen or others who may buy things needful for their proper use;" there you have import. Let none hereafter bewray so much ignorance as to assert export and import cannot be found in the acts of Parliament. Neither is the jibe altogether so witty which the defenders throw upon the simplicity of those times wherein they untruly allege thir privileges were first conferred, viz. that by act of Parliament all sailing was then prohibited from St. Jude's and St. Simon's day, till Candlemas, that is, from the middle of October till the beginning of February. Is not this the reigning malignity of the age? Has it not infected all persons of whatsoever degree, who think they cannot raise their own glory unless they throw dirt upon the tombs of their departed ancestors? Must all the wise and glorious actings of former ages be thurst down, to usher in the transactions of this time into their place, as if nothing were worthy to be upon record save that wherein we can plead a share ourselves? Shall not we be justly served by our posterity, who shall deride all our laws (which we extol so much in comparison of those that were before,) as insipid and physonless if considered to theirs? Why shall Scotland be condemned for making such a law, when it was an universal practice over the whole northern world, where the seas were boisterous, and the use of the compass or mariner's needle first discovered in Italy was not then well known?* Shall the apostle Paul's advice be mocked at, because in the account he gives us† of his navigation from Judea to Rome, he tells us the winter was come, sailing was dangerous, and therefore his advice was they should take up their winter quarters at the fair havens, which (hoping to gain Phœnice in Crete, and there to winter,) they neglected? This rashness would have stood them all their lives, had not Paul obtained them of God. Interpreters on the place tell us, no mariners used then to sail by the space of four months in winter, though it was in a Mediterranean and inland sea. Neither is the common law silent here; for the Emperors Gratian, Valentinian, and Theodosius, by their *constitut. in L. 3. C. de Naufragiis, lib. xi.* declare that sailing shall only be reputed legal and necessary that is undertaken between the calends of April and the calends of October.

This much by the way, in vindication of that act of Parliament; which, if rightly considered, will not be found altogether so ridiculous, distinguishing always the times. I shall now proceed to the act of Annexation in 1587, whereon thir defenders seem to lay great weight. Whereto it is replied, 1*mo*, That clause makes nothing for the burghs of regality or barony; seeing *ponendi semper sunt termini habiles, et verba improprianda, quando alias sensus absurdus vel juri contrarius ex iis resultaret;* and so it is to be only understood of such as had obtained themselves erected in burghs regal; of which kind we have many in Scotland, as Glasgow, Dumfermling, Kirkcaldy, Dysert, Arbroth, &c. 2*do*, *Esto*, it were to be understood of burghs of regality which never came to be royal burghs, the said act gives them no liberty of trade, but allenarly declares what privileges they were in use and pos-

* *Vide l.* 6. *C. De officio rectoris provinciæ.* † xxvii. chapter of the Acts, verses 9, 10, 11, and 12.

session of before they shall retain the same unprejudiced by this annexation: lest any should have fondly thought that the spiritual and temporal power of the Prelates and Abbots who had endowed them with such privileges being suppressed and abolished, the liberties themselves should also have ceased with the power; and so that it is only of the nature of an *Interdictum uti possidetis.* *3tio,* Can an obscure clause, cast in by the bye, in a long act consisting of many members, preponder such a continued series of laws as the pursuers' privileges are asserted by, all which acts treat directly of our purpose and nothing else? As for the pretence that his Majesty is the sole disposer of trade, by act of Parliament in 1663, and that he has given all these privileges to burghs of regalities, and wherein also they stand infeft; it is REPLIED, 1*mo,* The defenders strain the act 1663 beyond its just meaning, the design of that act being only to empower his Majesty to restrain the importing of foreign commodities, or to lay such customs and impositions thereon as pleases him, or may be equivalent to a restraint. And upon this foundation Sir Walter Seaton and others, who even at that time designed for a monoply of the salt, they procured an imposition of L.12 upon every boll of foreign salt to be imposed by his Majesty, who had got a general power so to do by the foresaid act; and it is well known that act was only designed to be a colour to that horrid and dangerous monopoly; and therefore is impertinently wrested to the case now in hand. *2do,* Any grants the burghs of regality have got, the same are null, proceeding *a non habente potestatem;* his Majesty being denuded of all these privileges of before, in favours of the royal burghs: they are but private deeds sinistrously impetrated to the prejudice of a third party; they have no force against an act of Parliament; they are granted *parte non citata,* and so *salvo jure;* they are null, not being granted in plain and open Parliament, as our laws most wisely require; and therefore they can never plead a like privilege with the pursuers, as if both derived their rights from one common author. (Act 43, in 1455.)

As for the defenders' grievances and inconveniences which they zealously aggravate, viz. that some burghs have freedom which are of no use to the country; others want that freedom, which if they had, might be improven to great advantage; that some unfree men are debarred from merchandizing, who yet understand more solidly the principles of trade than a whole town does, &c. To which it is REPLIED, That these inconveniences are so easily salved and remedied, that it is wondered the defenders are not ashamed to urge them so vehemently. That burgh of barony or regality that for situation or otherwise may serve the lieges most commodiously, upon representation may procure themselves erected by his Majesty, with the privileges of a burgh royal; whatever person would better himself or his country, by communicating and exercising his skill in the way of trade, upon address to the magistrates of what burgh royal he please, he may get himself incorporated and made a burgess.

The slight the defenders make use of, to cause this pursuit to pass for unfavourable and odious, is false, viz. that since the institution of the Session, the royal burghs could never obtain a declarator upon their privileges before the Lords; I say, to speak charitably of it, it is false; for Balfour, in the title of Burrows, folio 9, sets down a number of sentences recovered *in foro contentiosissimo* at the town of Edinburgh's instance against Leith; as also at the instance of other free burghs against unfree-men; in which it is expressly decided, that the king may not give power or licence to any of his leiges, unfree-men, to buy any kind of merchandize or staple goods, or to sell the same, within the liberties of any free burgh;

and if his Highness give any such licences, the Lords will annul and discharge the same, because the same be given in hurt and prejudice of the burghs, in contrary the commonweil and laws of this realm; and this was found on the *2d of July*, 1550, betwixt the *town of Edinburgh* and one *David Rowan*. *Item*, No inhabitant of the town of Leith, or other unfree-man, must pack or peill within Leith or other unfree places, but must bring the same to Edinburgh, the principal staple thereof, where they must be bought from freemen and no others; as was decided by the Lords on the *17th of June*, 1558, betwixt the *towns of Edinburgh* and *Leith:* with many other of the like nature. Though these be sufficient to convict their assertion of levity, yet lest they vilipend these as old, I will furnish them with fresher. Durie, at the *4th of February*, 1630, tells us the Lords found *the town of Edinburgh's* letters orderly proceeded against *Leith;* whereby they were discharged to tap or sell wine in small. For all that time there was no more claimed or controverted betwixt the free and the unfree burghs, till now that the foundations of all law are violented and shaken. And yet it was then alleged for Leith, as is now alleged for thir defenders, that the royal burghs' privileges were gone in desuetude; a contrary consuetude had succeeded; that they were contrary to the common weil, &c. all which was repelled; and this they did before the act in 1663 was made.

I might adduce many more instances, but I shall refrain, lest it nauseate your Lordships.

Where the defenders allege that the tyranny of the free burghs over the unfree ones, was the fruitful mother by whom the regal burghs did multiply, (each striving to erect themselves, that so they might be free of that oppression,) the great part of which brood are again studying an escape from thraldom and poverty, though it should be by showing their mother's belly: the representation (I say,) is calumnious and off the road; for it is well known, that the true incentive moving many unfree burghs to obtain erections in burghs regal, was to put themselves under a covert from the cruel and barbarous oppression of the nobility and neighbouring gentry, whereunder the country then groaned, and I fear is not well freed of it yet. And this is the only true cause of their desire to be erected, and their present desire to be disjoined.

As for the last overture proposed by the defenders, viz. that this cause may be taken into the Parliament, I shall say only two things; the first is, the royal burghs will never decline the sentiment of a court where their cause has been so oft and so favourably judged already; but next seeing no clearer act can be drawn up in Parliament in this affair than what we have already, I humbly conceive the Lords should never decline their own authority, nor put it in the hands of any other. This (sure I am,) can never displease your Lordships, for it is spoke in maintenance of your jurisdiction, and in so doing, ye become all my clients; and who then shall doubt of the event of the cause?

My Lord, you have seen how weak and how ruinous the defenders' grounds have proven, however they were exactly fashioned to the modern rules of art. The royal burghs beg your Grace's patience only to one word, and so they shall have done. It is in your Grace's power to-day to vindicate the wounded honour of our venerable acts of Parliament. Are they not prostrate at your Grace's feet, craving your justice against those sacrilegious defenders, who, pleading for they know not what, natural liberty, have most unnaturally leapt over all bars

both civil and religious? Do not think it a light matter to rob the royal burghs of their privileges and birth-right, which are become their property by as good a title as any of you brook your lands and estates. By what hand ye shall communicate thir liberties now called in question, to the defenders, by that same shall ye lop off the burghs from being the third estate of the kingdom. Remember that a threefold cord ought not to be easily broken; consider what lamentable confusion may follow upon the loosing of one pin of the Government; that the touching such a sacred fundamental constitution may unhinge the whole; that Government is like to a sheaf of arrows fast bound,—pull out one, all will follow and fall to the ground; and how terribly dangerous such an innovation may be. Let not the burghs' complaints be heard, that a tribe has this day failed from amongst us; give them not cause to say of you what the Israelites said of their Egyptian tax-masters, that brick is required of them as formerly, and yet straw is withdrawn from them. Your Lordships know that though changes tickle the fancy and please our appetite, yet all who have written the doctrine of politics tell us *quod omnis mutatio etiam in melius est periculosa;* that it proves ofttimes safer to continue an inconvenient custom, than to introduce a new one though better; that *in rebus novis constituendis, evidens debet esse utilitas, antequam recedatur ab eo jure quod diu æquum visum est;* that Plato avows there ought to be no mutation *a bono ad melius,* but only *a malo ad bonum;* that old customs,* like long lived men, are presumed to have arrived at that age through their sound and equable temperament and constitution; and therefore let the royal burghs enjoy their privileges as they have done hitherto; let them receive no dash nor innovation from you, lest posterity (who will assume the freedom which would be reputed criminal in us,) relate your consulship and government in the number of the unlucky and unfortunate days.† Be pleased to consider what manner of defenders we have to do with. Is it not the Lords of the regalities? I shall spare to tell your Lordships what for a severe eye his Majesty's most royal predecessors the Kings of Scotland has ever had over regalities, truly valuing the granting of them as the giving away of so many precious and irreparable jewels and diamonds out of their crowns.

I shall spare to rip up the sentiments of our Parliaments from time to time anent regalities.

By the 43d act of Parliament in 1455,‡ all regalities that then were in the king's hands are ordained to be annexed to the royalty, and that in time to come, no regalities should be granted without deliverance of Parliament; (by which test if the most part of our regalities were tried, they would be infallibly found null;) and the very next act of that Parliament discharges all heritable offices, (of which sort regalities are,) and revokes all such offices given in fee since the decease of King James the First. Has it not been the great inconvenients following by them that has extorted these acts from the Parliament? yet stay a little and we shall see more. Because thir regalities were claiming to privileges prejudicial and burdensome to the country, therefore by act of Parliament in 1457, (it is the 73d act,) they are restricted to their privileges and freedoms as they are found due; with certification, if any having regal, abuse it in prejudice of the king's laws and breaking of the country, (all which presupposes horrid abuses, seeing *ex facto oritur jus, et ex malis moribus bonæ nascuntur leges,)* they shall be punished by the king

* See Maximus Tyrius, *sermone* 23. † Dies nefasti et atri. ‡ *Vide* 26th act, in 1449.

and the law as effeirs. *Item*, in all the revocations of our King's regalities, are always one thing: *vide* act 51 in 1493, and all the rest of the revocations; *vide* act 46, in *March* 1649. Again in the 277th act, granting a taxation to King James of 200,000 merks in 1597, the regalities are stigmatised as defrauding his Majesty of the taxation due to be paid by the inhabitants of the said regalities, who being put to the horn commonly obtain simulate dispositions of the same from the lord of the regality, having right to their said escheat, to the intolerable prejudice of his majesty's collector. Your Lordships know better than I, that the free princes of Germany at the beginning got their lands erected to them by the Emperors, with some such like privileges as those of our regalities are; which princes now have wrested sundry of the most important and most incommunicable badges of royalty and sovereignty from him, and come to that pass, they pay him little or no recognizance, if any. Are not the lords of the regalities to this day contending with his majesty, (so that it is not much to be wondered to see them unjustly vex the royal burghs,) which of them shall have the casualties of bastardrie, and last heir of those who die within their resort. And though their vast and boundless appetite is to be suspected, yet I must beg pardon to say, that if all the regalities in Scotland were founded in as much merit and incomparable deservings as that which your Grace has got erected, either their disconformity to that standard would make them fewer, and so ease the country of them, or their conformity would allay much of that grudge and prejudice the lieges have against them.

In respect of all which, &c.

The Lords the time of this debate, forced the royal burghs to declare that it shall be leasum and lawful to gentlemen and all others, whether free or unfree, to export and send abroad their corns, cows, linen cloth, plaiding, or other product and manufactory of the country, without owning the burghs; or at their pleasure to sell them to unfreemen within the kingdom, who shall have likewise power to export them: providing always the gentlemen, their servants, or the unfreemen to whom they sold their commodities and who export them, bring home, and import nothing therefore, but either money, or else so many foreign commodities as shall be needful for their own use.

This was the more easily condescended to, because the import (which is three times more considerable than the export,) being secured, the prejudice and hazard was the less, seeing all export is *intuitu* of the import. Next, the unfreemen get no more by this concession, than what by the very acts introduced in favours of the royal burghs is reserved to them. See act 11 in 1466; and the 152d act in 1592. As this question was unhappily started at a wrong time by the burghs royal, so it gave rise and opportunity to the act of Parliament in 1672, voiding the case against them. *Advocates' MS. No. 353, folio* 138.

1672. *June* 25. NASMYTH and FORREST *against* ALEXANDER HAMILTON of Dalzell.

THIR two persons convening the laird of Dalzell as heir to his father, for making payment to them of L.32 which they paid for his father in 1653, when they