

ferred where ignorance appears, or it can be ascribed to another cause ; as was found 6th July 1661, *Telfer* ; and December 12, 1665, *Barns* ; and it is plain thir poor people never understood to give him the half of his own sum, *viz.* 3500 merks, for discovering little or nothing, unless we suppose them to be idiots.

As to William Buntein's gratuity, it was but 300 merks,---a small remuneration for his bygone services, and giving up the papers ; and the Lords assoilyied him. But, as to Middleby's agreement, the Lords thought it not so fair, and therefore refused to extend the contract to his own sum, or to allow him the half of it ; but declared, though they reponed the complainers, yet he might retain his pains and expenses, to be modified by the Reporter. Some moved, that the witnesses in the back-bond might be examined, whether it was not revealed to them, that he was debtor himself in 7000 merks without any concealment ; but the Lords thinking there was *dolus ex evidentia rei*, they refused to take any farther expiscation or trial.

*Vol. I. Page 710.*

---

1696. February 12. MR JOHN BUCHAN, Agent for the Royal Burghs, *against* The TOWNS of MUSLEBURGH and DALKEITH.

Mr John Buchan, Agent for the Royal Burghs, against the Towns of Musleburgh and Dalkeith, for paying a proportion of the burghs' stent and taxation, or else desist from all trade, either of export, import, or retailing, conform to the clause in the 31st Act of Parliament 1653, anent the communication of trade.

ALLEGED, *1mo.* That they were content to be regulated by the Act 1690, anent the trade of the royal burghs ; and that the contract betwixt the burghs and Mr John Buchan could make no innovation thereof ; and the Act in 1693 has only ratified the said contract, but derogates nothing from the Act 1690. *2do.* That, by King David Bruce's charter, *anno* 1364, to the four burghs belonging to the Abbacy of Dunfermling, *viz.* Dunfermling, Kirkaldy, Queensferry, and Musleburgh, and many Acts since, they have the full liberty of trade with any other burghs in the nation ; and so were *in bona fide*, and ought to be assoilyied from bygoners.

ANSWERED,—The inequality of all the old acts giving the royal burghs the whole trade was, that it established a monopoly to the exclusion of others ; and the iniquity of the 5th Act 1672, was, that it robbed the burghs of their privileges, and communicated the same to the burghs of regality and barony, without imposing any part of the burden annexed to these privileges, but leaving the same to be wholly paid by the royal burghs : But now, by the Act 1693, all thir inconveniences are cured, and trade is communicated and diffused, they always bearing a proportional part of the burden, (but prejudice of the privileges and encouragement given to manufactories ;) and if ye decline the *onus*, ye must not have the *commodum* ; ye must desist from trade either in gross or retail. And, as to the Town of Musselburgh's charters, they were but *periculo petentis et salvo jure*, and taken away by subsequent laws : Neither could the king give them the trade due to royal burghs, in prejudice of the *jus quæsitum* to them ; and his grants must be understood *in terminis juris*.

The Lords found the standard and rule of trade now betwixt the royal

burghs and other traders was the Act 1693 ; and such as repudiated the offer of a participation of trade behoved to give over trade, if they would not subject themselves to a share of the burden annexed thereto ; and found they could not plead *bonā fides*, after the public Act of Parliament 1693 : and therefore nominated two of the Lords, with the Reporter, to adjust the quota of thir burghs, for bygones, and in time coming. But, for the period and interval, from the Act 1690 to the Act 1693, found them only liable in the penalties, where they shall be proven to have transgressed the tenor of that Act, in buying staple goods from unfreemen, not burgesses of royal burghs. *Vol. I. Page 710.*

---

1696. *February 14.* SYMPSON and HOME *against* The EARL of HOME.

ANSTRUTHER reported Sympson and Home against the Earl of Home. The Lords found, Though they were served as lineal heirs-portioners to Jean Home, Lady Aiton, yet, she being heir by virtue of her father's tailyie, they could not call for reduction and improbation of that tailyie ; for that were to quarrel their author's right ; so the Earl was not obliged to take a term : But if they insisted, in the exhibition and declarator, that the Earl had amitted his right to the Barony of Aiton, by incurring the irritancy, through assuming the title and dignity as Earl of Home, they might lawfully do the same.

*Vol. I. Page 711.*

---

1696. *February 19.* GRAY of CREIGHY *against* GORDON of AVACHY.

GRAY of Creighy against Gordon of Avachy, for payment of a debt contained in his grandfather's bond. The passive titles were offered to be connected thus :---You represent your father, and he had a disposition to a part of the estate posterior to the contracting my debt. ALLEGED,---A disposition was penal, and like vitious intromission ; which was never sustained to infer a universal passive title, unless established in the party's own lifetime ; because he might have grounds to elide it, and ascribe his intromission, which might be unknown to others ; and even behaviour as heir (which is an heritable passive title,) must be proven against the party while in life ; and it were hard that a disposition to a few acres should, *præceptione hæreditatis*, subject a man to the whole debt. ANSWERED,---There is a great difference betwixt vitious intromission, which is only probable by witnesses, and accepting a disposition *post contractum debitum*, which is instructed *scripto*.

The Lords thought the point new, and ordained it to be heard in presence.

*Vol. I. Page 712.*

---

1696. *February 19.* ARCHIBALD BUCHANNAN *against* BAILIE of WALSTON.

LAUDERDALE reported Archibald Buchanan against Bailie of Walston, for re-