

1708. *January 16, and 29.* SIR ALEXANDER CUMING of Culter, *against* SIR ANDREW KENNEDY of Clowburn.

IN the reduction and declarator, at the instance of Sir Alexander Cuming *against* Sir Andrew Kennedy, for reducing Sir Andrew's right to the office of conservator, upon grounds of malversation; the Lords, the 19th November, 1707, having sustained his defence, founded on the Queen's indemnity in March, 1703, to exculpate for any malversations before that time: Sir Alexander alleged that Sir Andrew since then, had been guilty of malversations in office sufficient to deprive him. And particularly insisted upon this, that though by acts of the royal burghs, and the third article of the staple contract, the product of this nation only, should be staple goods, free from all duties and customs; and by the thirteenth article of the said contract, none are allowed to trade in staple goods but those of the Scots nation; and by the act of burghs, 1699, factors are strictly discharged to give the benefit of the staple to strangers, or to cover any staple goods belonging to strangers, as Scotsmen's goods, which act the conservator is to see executed: yet Sir Andrew Kennedy had betrayed the trust reposed in him, by allowing, conniving at, and being accessory to, the importation of Irish goods, such as butter, hides, and tallow; and, for a gratification to himself, allowed them to be entered by Scots factors at the staple port as Scots, and thereby enjoy immunity from custom and duties, to the great loss of the manufactory and native product of Scotland. And albeit it might have been expected, that one who had been under prosecution for abuse of his office, and necessitated to lay hold on the benefit of an indemnity on that account, would have behaved himself with that care and conduct as not to expose himself a second time obnoxious to legal punishment; seeing *cum lex in præteritum quid indulget, in futurum magis velat, L. 22. ff. de legibus*: yet neither indulgencies, admonitions, nor indemnities, have been able to reclaim Sir Andrew; who has so far slighted the grace of pardon, as to give neighbouring States occasion again to complain, that since that time things are worse than ever. Yea, so incorrigible has he approved himself, that he would not escape, even in Turkey, where offices are mostly rather calculated for the profit of the governor than of the governed.

ALLEGED for Sir Andrew.—1. It was not in his power to communicate privileges and exemptions: nor did the immunity of the Scots from customs and duties, hinder the states of Zealand from conferring the like privileges upon others. 2. No material prejudice did arise to the royal burghs, or trade of the nation, by importing the staple goods of butter, hides, and tallow, from Ireland to Camp-verre, by Scotsmen as staple goods; but, on the contrary, Scotland was gainer thereby: seeing we have not these goods in such abundance as to be able to export them to the Netherlands, or any where else, to any advantage. 3. Sir Andrew had done no more than had been the practice of former conservators; and *communis error facit jus*. 4. He had represented to the commissioners of the burghs, that factors covered goods belonging to strangers, as Scottish goods; whereof no notice was taken, nor any contrary injunction given: and he had all the reason in the world to believe, that, seeing the factors complained

of were connived at, himself could be in no worse condition for intromitting with the conservator-dues of such goods.

ANSWERED for Sir Alexander.—1. *De jure* indeed, it was not in Sir Andrew's power to communicate our privileges to foreigners, but *de facto* he did it. If our privilege by the staple contract imported not something more than other nations had, it would be pernicious to us, who, in confidence thereof, are confined and thirled to such a port, be the markets high or low: for strangers, having the same advantage, with liberty to go where the markets offer best, would have much the better of us. But whatever privileges the states of Zealand might give other nations; *de facto*, they never gave any; and till such time as they bestow them also on others, they are solely ours. If strangers had any such privilege, *quorsum* do they make use of false cocquets, false entries; bribe the conservator, waiters, and license masters, to let them pass as Scots? It is strange that we should draw in question among ourselves, a point concerning our privileges, that has always been yielded by the states of Zealand and town of Camp-verre, who contracted with us! 2. If staple goods of the product of Ireland were privileged to come to Camp-verre, free of duty, it would entirely destroy our native product: for the Irish would be able to undersell us; and the other provinces would allow those to be transported among them, free of custom upon inland passports, as they do Scots staple goods: because that would not only diminish the public revenue, but prejudice the other trading towns in the Netherlands, by drawing the trade and shipping from their harbours to Zealand. 3. If the iniquitous practice of Sir Andrew's predecessors could operate his excuse for a malversation contrary to standing laws, public utility, yea, and common honesty; by the same argument, a waiter, or custom-house officer, taking money, and permitting goods to be run without paying the Queen's customs; or a colonel making false musters, and keeping a great many men in his pocket; or a governor in the plantations, suffering strangers to trade and ship off the tobacco, sugar, and spices of the islands, to foreign markets;—might all come off on pretence of their predecessors having done the like. Did not the Lords of Session deprive Sir William Primrose of his life-rent office of clerk to the notaries, for his omission to call in their prothocals: albeit he alleged that his predecessors in office had been guilty of the like neglect; and there was no positive law enjoining such a thing? *Nam quod non ratione introductum, sed errore primum, deinde consuetudine obtentum est, non debet obtinere, L. 39. ff. de legibus.* 4. As to the allegiance that Sir Andrew had exonerated himself to the burghs, by laying the matter before them, who did not reprehend it, or give new instructions about it; the same is not relevant: for whatever might have been said for his exoneration now, had the burghs proceeded to cognosce, censure, or pardon the transgression; no such thing being done by them, he cannot bottom his excuse upon that topic. But then again, it was not in the power of the royal burghs to dispense with the communication of our privileges, in prejudice of burghs of Barony, who, by Act of Parliament have an interest in trade; or in prejudice of heritors, who have the chief interest in the native product and manufacture of Scotland.

The Lords found Sir Andrew Kennedy's receiving since the indemnity, conservator-dues for butter, hides, tallow, and other staple goods, coming directly from Ireland to the staple-port, to be a malversation, relevant to infer deprivation of

his office of conservator; notwithstanding of what is represented concerning the practice of former conservators, and the stating the matter before the commissioners of the burghs, without any new injunction from them.

Thereafter, *January 29, 1708.* Sir Andrew Kennedy alleged, that, by his commission, he was both resident and conservator, which are distinct offices: and though his right to the one be reduced, it stands good as to the other, wherein he hath behaved himself well and faithfully.

ANSWERED for Sir Alexander Cuming,—Not to mention the many particulars wherein Sir Andrew also abused his character of resident, who was a resident without residing, as he was a conservator without conserving; how can he pretend to act in that sphere, contrary to her Majesty's pleasure? And what imputation would it be to her Majesty, to have a minister palmed upon her after he hath rendered himself unacceptable abroad, and obnoxious at home? Especially considering that the sending and recalling residents and foreign ministers at pleasure, is her Majesty's royal prerogative.

The Lords repelled Sir Andrew's defence upon his office of resident.

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REVERSED on Appeal.—*Vide* Robertson's Appeal Cases p. 19.

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1708. *February 10.* ANNA MUIRHEAD, and ROBERT LEITH, Writer in Edinburgh, her Husband, for his Interest, *against* GEORGE LOCKHART of Carnwath.

IN the charge, at the instance of Anna Muirhead, as heir served to Robert Muirhead, writer in Edinburgh, her father, and executrix confirmed to Martha Lindsay, her mother; for payment of L.4000 resting of L.9000, contained in a bond secluding executors, granted by George Lockhart of Carnwath, to the said Robert Muirhead: who disposed all his effects, heritable and moveable, in favours of the said Martha Lindsay, not mentioning her executors; with this provision, that she should be bound and obliged to pay to Anna Muirhead, their only daughter, the sum of 7000 merks at her age of fifteen years, or marriage, and the superplus of his estate, reserving Martha's own liferent thereof. Carnwath suspended upon this reason, that he was neither in *tuto* to pay to the charger as heir to her father, because he was denuded by the disposition in favours of his wife; nor yet as executrix to her mother, because the bond granted to the father expressly secluded executors: and the disposition to the mother was only to herself, and not to her and her executors: so that the debt continued heritable in her person, as it was heritable in the father's person; and the charger could not have right thereto, without being served heir to her mother.

ALLEGED for the charger,—1. The mother having no absolute right, but only a naked trust of administration for the behoof of the charger *nominatim*, which *fidei-commissum* ceased by the mother's death; a general service as heir to the father, who was creditor in the bond, was sufficient to establish the right in the charger's person. 2. The bond, though heritable in the father's person, was moveable in