

February 1. 1744.

INFORMATION

F O R

John Johnston, and others, Inhabitants of Stromness in Orkney, Pursuers,

A G A I N S T

The Magistrates and Town-Council of the Burgh of Kirkwal, Defenders.

IN *June 1742.* the Pursuers were convey'd before the Steward-Depute of *Orkney*, at the Instance of *Robert Sutherland* Merchant in *Kirkwal*, and Collector of the Cefs and Stent of the said Burgh, upon a Libel, setting forth, That the Defenders were justly addebted to the Pursuer, conform to his Accompt therewith produced, the respective Sums of Money in that Accompt mentioned, and therefore concluding for Decreet. This Libel, nor the Accompt itself, does not set forth, *quo nomine vel jure* the Defenders were indebted to the Pursuer in the Sums by him acclaimed, but the Title to this Demand was in some Measure intimated by the Pursuer's producing, with his Libel and Accompt, another Writing, which was called a Cast-Book of the Cefs and Stent of the Burghes and Inhabitants of the Burgh of *Kirkwal* for the Year 1741. with a Declaration on the End thereof, of Date the 11th of *September 1741.* by certain Persons said to be sworn Stent-Masters for proportioning the Stent of the said Borough; by which they declare, that they proportioned the Stent upon these liable in Payment thereof for the Service of the said Year, without Fead or Favour, according to the best of their Knowledge; and in which Cast-Book, the several Sums in the Accompt libelled, specified, are proportioned and stented upon the several Defenders; as also produced an Approbation of the said Cast-Book by the Magistrates of *Kirkwal*, of Date the said 11th of *September.*

The now Pursuers, then Defenders in that Action, objected to the Relevancy of this Libel, and of the Vouchers by which it was supported, and to the Authority of either the Stent-Masters or Magistrates of the Burgh of *Kirkwal*, to impose any Part of their Stent upon the Inhabitants of *Stromness*, a Village situated indeed in the same Island, or main Land of *Orkney*, but on the opposite Side of the Island, and at the Distance of about 12 Miles from the Burgh of *Kirkwal*; and indeed, how true soever it may be, that these Stent-Masters of *Kirkwal*, proceeded, as they say, *without Fead or Favour*, according to the best of their Knowledge, to proportion the Stent of that Burgh upon those liable in Payment thereof, it remained to be a Question, which they take for granted, by what Law or Rule they prove the Inhabitants of *Stromness*, to be of the Number of the Persons liable to pay the Cefs of the Burgh of *Kirkwal.*

The Steward-Depute, however, decerned against the Defenders in Terms of the Libel, but was pleas'd to reserve to the Defenders to insist, before the Court competent, in a Reduction or Declarator for obtaining Relief, as accords.

The Petitioners were at first unwilling to wait for so slow a Remedy as was here pointed out to them, and conceiving themselves to be greatly aggrieved by the Decreet, and that it was so manifestly iniquous, even as if the Cefs of one Burgh or County had been impos'd on Persons living in another Burgh or County, they apply'd to your Lordships for Relief by a Bill of Suspension; but this, it seems, your Lordships were of Opinion, it was not fit to pass, in respect of a Clause that has been insert'd of late Years in the Cefs Acts, and therefore our Bill of Suspension was

was refused, but this not without Intimation, that the Law should be open to the Complainers to get ample Redress by Way of Reduction and Declarator, unless very good Cause should be shewn by the Defenders to justify an Imposition that was apparently so extravagant and oppressive.

The like Imposition was, however, repeated for the ensuing Year 1742. upon which the Petitioners were constrained to bring their Action before your Lordships, for Reduction of the Decree above recited, past in *June* 1742. for Repetition of the Sums extorted from the Pursuers in virtue thereof, and a Declarator of Immunity from the like Exactions in Time coming; in which Cause the Production being satisfied, both the Reduction and Declarator came to be discussed before the Lord *Balmerino* Ordinary, in which his Lordship, by Interlocutor of the 13th of *December* last, *Finds and declares, that the Magistrates of Kirkwal have no Right to lay any Part of their Cess on the Inhabitants of Stromness as such, but finds such Inhabitants as are also Burgeses of Kirkwal liable to be stented, unless they do upon Oath purge themselves from Dealing in foreign Trade; and assolies the Defenders from Repetition of Bygones, and decerns accordingly.*

In the first Part or Proposition of this Interlocutor, both Parties have acquiesced, and so far as that goes the Libel of Declarator is decided; but against the rest of the Interlocutor the Pursuers applied by Representation, to which Answers being made for the Defenders, *The Lord Ordinary, on the 19th instant, makes Avisandum to the Lords with the former Minutes, and ordains the same to be printed, and allows either Party to put in what farther Memorial they think proper, and to prefix this Order to the printed Minutes.*

There are two Propositions which the Pursuers conceive to be undeniably true in Point of Law, being both of them settled by Statutes, and which they conceive will serve to determine the present Question. The first of these is, That no Person is liable for the Cess payable by any Burgh-Royal in this Kingdom, but the Heritors of Lands or Tenements within such Burgh, and the Burgeses actually residing and trafficking within the same.

This appears from many Acts of Parliament, and, *inter alia*, from the 155th Act, 12th Par. *James VI.* intitled, *Anent the Taxation of Burghs*, whereby 'It is statute and ordained, that all Manner of Persons, Inhabitants of Burghs, exercising any Manner of Traffick, Merchandize, or having Change within the same, shall bear their Part of all Taxes, Stent and Taxations, Watching and Warding; — and ordains this to have Execution against all Persons exercising the Traffick of Merchandize, or other Change, in any of the Burghs of this Realm, whether they be admitted free Burgeses therein, or not.'

To this a Number of other Statutes might be added for proving the same Thing, as the Act 280. 15 Par. *James VI.* and the Act 6. Par. 19. *James VI.*

The Defenders were pleased to alledge upon their Part, the Act immediately preceeding the first Statute above mentioned, being the 154 Act in the Year 1592. intitled, 'It is not leifom to unfree Men, but to Burgeses, to exerce the Traffick of Merchandize.' From which the Council for the Defenders contended, that it was lawful for Burgeses of Royal Boroughs to exerce Traffick tho' not residing within the Burgh, and from thence they infer, that such Burgeses, so trafficking, may lawfully be stented by the Burgh from which they derive their Freedom.

But to this the Pursuers reply, That they deny both the Proposition and the Consequence; the Proposition is not proved by the Statute to which they refer, and it is disproved by other Statutes, which serve to confirm those already alledged for the Pursuers upon this Article, and particularly by the 12th Act 1690. in favour of Royal Boroughs, which enacts, 'That the importing of all foreign Commodities and Merchandize, either by Sea or Land, doth and shall belong to the Freemen and Inhabitants of their Majesties Royal Burghs allenarly, excepting Cattle, &c. and likewise, that the exporting by Sea of all the native Commodities of this Kingdom, doth and shall belong to the Freemen Inhabitants of the Royal Burghs only, excepting Corns, Cattle, &c.'

And again, by the 30th Act 1693. intitled, *Act for the Communication of Trade*, it is, *inter alia*, provided in these Words, 'And their Majesties, with Consent foresaid, do hereby strictly discharge all Persons whatsoever to exercise any Kind of Trade,

Trade, under the Penalties contained in the Act of Parliament, except *Burgeses* *Indwell rs in Royal Burghs*, and their free Ports, by Consent of their Burghs to which they belong.

These Acts make it plain, that the Privilege of foreign Trade is not personal merely to Burgeses, but is local also, and belongs to them no longer than they are actually resident within the Burgh, or a Part belonging to it; and the Pursuers believe, that the Defenders would get no Thanks from their Brethren of other Burghs Royal, if they could prevail in getting the contrary Doctrine established.

The Pursuers have also denied the Consequence, supposing, for Argument's Sake, that the Proposition itself could be maintained, *that is*, we deny that any Royal Borough can follow its own Burgeses wherever they may happen to reside, or even to be trafficking in foreign Trade, in order to compel such non-residing Burgeses to pay a Part of the Stent of the Borough. *First*, Because there is no Law authorising such Action, and it is repugnant to the Nature of the Thing, that any Burgh should have Power to raise its Stent outwith its own Bounds or Privileges; for, if this were admitted, the Defenders might follow their Burgeses, not only across the Main Land of *Orkney*, but as far as the Mule of *Galloway*, if any Burgeses of *Kirkwall* should happen to reside thereabouts. And, *2dly*, what shall be done, according to the Defenders Doctrine, if the same Person, which often happens, be Burgeses of several Royal Burghs, and yet should reside in none of them, and be found to carry on Traffick notwithstanding? To which of the Burghs of which he is a Member must he pay Contribution? Or must he pay to all of them? Or to the least distant from his Place of Residence? Or to the first who shall think fit to pursue him? Or to them all by different Proportions? And by what Law will the Defenders find the Answers to these Questions resolved?

The other Proposition, to be considered in the present Question, is one whereof the Pursuers must admit the Truth, *namely*, That, upon the Supposition that they, or any of them, whether Burgeses or not, be Dealers in foreign Trade, whilst they reside at *Stromness*, which has not obtained the Communication, they are liable to be prosecuted in the Terms of the Statutes in that Behalf made, and specially in Terms of the 5th Act 1672. concerning the Privileges of Burghs Royal, which rescinds all former Acts of Parliament, in as far as they are contrary to this, which justly takes Notice, that some of the Privileges, as formerly extended, were never in Use, and were highly prejudicial to Commerce. But by this Statute the Remedy is provided, *namely*, 'That the Goods or Commodities of the unfree Traders shall be escheated, the one Half to the King, and the other Half to the Burgh Apprehender; and that if the said Goods or Commodities (*viz.* that have been bought or sold, exported or imported, contrary to this Statute, and the Privileges of Royal Burghs granted thereby) be apprehended within any of the said Royal Burghs, or the Suburbs or Appendicles belonging to them, or within their Ports or Harbours, the same may be summarily seized and secured, as Goods escheat in Manner foresaid; but if the said Goods, competent only to Freemen of Royal Burghs shall be found, or alledged to be found elsewhere, they shall only be arrested, and pursued to be declared escheat, to be divided in Manner above written, before any Judicature as accords of the Law.'

The Pursuers have thus particularly mentioned so much of the Words of this Statute, in order to shew your Lordships what is the only competent Remedy, supposing it to be true, which they do by no Means admit, that any of them had been truly Dealers in foreign Trade, and the Remedy, your Lordships see, is, by arresting the Goods themselves, and bringing the same to Trial and Condemnation; but there is no such Thing competent, by this or any other Statute on this Subject, that the Pursuers can find, as that any Royal Burgh can proceed against the supposed Delinquents, in order to prove them guilty of Trespas by their own Oaths, as if it were proceeding by Way of *English* Bill, to recover his Majesty's Duties, which is indeed of the Nature of an Action for Debt, because the King is Creditor for those Duties; but here the Prohibition is enforced by a Confiscation of the Goods, which is a Sanction merely penal, and if the Goods are gone, they can no longer be either seized or arrested, and there is no Remedy left against these bypast Trespas.

And,

And, *last of all*, can it be competent, by Way of Defence against the present Action, to call upon the Pursuers to purge themselves of Trespases upon Oath? For if they have been guilty, and if that could be proved by Oath, what is the Consequence? Not, surely, that they were *ipso facto* liable to pay a Proportion of the Cels of *Kirkwal*, more than that of any other Burgh of the Kingdom, for such Relief can never be due, unless where the Communication of Trade has been regularly made; and this is what the Burgh of *Kirkwal*, neither has given, nor could give to the Village of *Stromness*, and consequently, whatever Trespases the Pursuers; or any of them, may be supposed to have committed, which they deny, it is not the less true, that the Exactions, complained of by this Process, were most illegal and oppressive. They would have been such, however moderate in the *Quantum*, because, to exact one Penny, without Law, is Oppression; but that is aggravated by the Exorbitancy of the *Quantum*, which, conform to the Decree obtained against a few of us in *June 1742.* amounted to 42 *L. Scots*; and, by the Decree recovered during the Dependence of our Declarator, to 132 *L. 13 s. Scots.*

Another Defence, that has been alledged in the present Case, is, That the Custom has long prevailed, and been submitted to, for the Inhabitants of *Stromness* to pay a Part of the Cels of *Kirkwal*. To which the Pursuers reply, *1st*. It is by no Means true, that this is an ancient or immemorial Custom; it is an Abuse that has grown up but of late Years, since the Town of *Stromness* began to grow somewhat more considerable, by the Addition of new Houses and Inhabitants. *2^{dly}*. If such an oppressive Practice had endured for above 40 Years, or a longer Period, that could not serve to legitimate the same. For what Connection has *Stromness* with the Burgh of *Kirkwal*, that is 12 Miles distant from it? It is neither subject to that Burgh, nor situated in its Neighbourhood, nor derives any Advantage whatever from it. And herein it differs widely from the Case of *Canongate* or *Leith*, which, by a long continued uniform Usage, or by Paction, have been accustomed to pay a certain Proportion of the Cels of *Edinburgh*, the Superior to these Suburbs, which, by the Neighbourhood of this City, are greatly profited, and yet are not taxed arbitrarily, or at Pleasure, by the Stent-Masters of *Edinburgh*, but have submitted to a fixed Proportion, which they subdivide among themselves by Stent-Masters of their own; in all which Particulars the Case of these Pursuers is widely different. They are remote from *Kirkwal*, and independent on it in every Respect in Point of Law; but they are remote also from the supreme Courts of Justice; and thus it has happened, that they have already been too long oppressed, tho' not long enough to justify or legitimate that Oppression; and so indeed the Lord Ordinary's Interlocutor has found, by the first Part of it acquiesced in by the Defenders; and, for the rest, the Pursuers humbly hope the Lords will have no Difficulty to declare the Immunity libelled in Behalf of all the Pursuers, whether Burgeses of *Kirkwal*, or not, without admitting of any Enquiry in this Cause, into supposed Trespases committed by them. And, *3^{dly}*. that the Lords will have as little Difficulty in decerning for Repetition of the Sums extorted upon the Decree in *June 1742.* or since that Time, and for the Expences of this Reduction and Declarator, to which the Pursuers were compelled to have Recourse for Redress against these illegal Exactions.

In respect whereof, &c.

WILL. GRANT.