

February 13. 1744.

MEMORIAL for the Magistrates and Town-council of
the Burgh of *Kirkwall*,

A G A I N S T

John Johnston and others, Inhabitants of *Stromness*.

THE said Village of *Stromness* is situated upon the Southwest-side of the Island, called the *Main Land* of *Orkney*, in the Mouth of the *Pentland Frith*; and as Ships that take their Northern Course are in use to touch there for Supplies of Provisions, the Inhabitants of this Village have thereby great Opportunities of making Profit in Trade, as they usually get foreign Commodities in Exchange or Barter for what they sell to the Ships, which pass that way, and in this respect they have the Advantage over the Inhabitants of the Burgh of *Kirkwall*, who cannot interfere with them in that Traffick.

This Conveniency of Situation has at all Times invited not a few of the Burges-
ses of *Kirkwall*, to take up their Residence in this Village of *Stromness*, where they have carried on their Trade, as entitled to the Privilege thereof, by being admitted Burgeses of the Royal Burgh of *Kirkwall*; and as their Right to Trade has never been disputed by the Town of *Kirkwall*, so on the other hand these Burgeses, who went to reside at *Stromness*, have always been in use to pay a Proportion of the Cels imposed by the Convention of Royal Burrows upon the Burgh of *Kirkwall*, which the Magistrates of that Burgh and Stentmasters, by them named, were in use to proportion by the same Rules, as upon the other Burgeses, who resided within the Burgh of *Kirkwall*.

At the same Time there were also some other Inhabitants of this Village of *Stromness*, not Burgeses of *Kirkwall*, who were permitted to trade without any Challenge on the Part of the Burgeses of *Kirkwall*, and they in like Manner were in use to pay some small Proportion of the Cels effecting to their Trade, and for that Reason were never quarrelled as *Illicite Traders*, nor prosecuted in Terms of Law, for dealing in such Branches of Trade as belong to the Burgeses of Royal Burghs only.

So this Practice has gone on immemorially, both with respect to their carrying on their Trade freely without Controul, and their paying the Proportions of Cels imposed upon them without Complaint, till about 3 or 4 Years ago, when a few of the most considerable Traders in *Stromness* began to complain to the Magistrates of *Kirkwall*, That the Proportion of Cels, payable by their Village, was not equally distributed among the Merchants who reside in it; upon which the Magistrates desired they would send some of their Number to *Kirkwall*, to inform the Stentmasters of the particular Trade of each *Stromness* Burgher; and accordingly a Committee of the *Stromness* Merchants came to *Kirkwall*, and sat with the Stentmasters, and got the Stent proportioned among the Inhabitants, as they had a mind; but when they returned home, their Constituents at *Stromness* were more dissatisfied than before, and complained that their Deputies had eased themselves to burden their Neighbours; upon which the Magistres of *Kirkwall* ordered a more equal Stent Roll to be made up; but this Alteration was taken so ill by the Gentlemen who had laid the above Scheme, that they not only refused to pay, but also prevailed with several others of the Inhabitants to refuse Payment of their usual Quota's of the Cels, tho' there are still a good many of them who continue chearfully to make Payment thereof as formerly.

Upon the above Refusal, the Magistrates of *Kirkwall* were obliged to pursue such of the Inhabitants of *Stromness*, as declined Payment, before the Stewart-depute of *Orkney* in *June* 1702, who decerned them to pay their Quota's of the Cels as usual; and the Inhabitants having offered a Bill of Suspension, the same was refused as incompetent. They have now raised a Process of Reduction of this Decreet, with a Conclusion of Declarator, " That the Burgh of *Kirkwall* has no Power to impose or levy any Stent from them, or the other Inhabitants of the Village of *Stromness*, and also concluding Repetition of not only of the Sums they paid in virtue thereof, but also of all Payments of Cels made by them for all Years bygone." And the Cause having been fully heard before Lord *Balmerino* Ordinary, his Lordship pronounced the following Interlocutor; *Having considered the above Debate, Finds and declares, that the Magistrates of Kirk-*

will have no Right to lay any Part of their Cefs on the Inhabitants of Stromness as fuch, but finds fuch Inhabitants, as are alfo Burgesses of Kirkwall, liable to be ftened, unless they do upon Oath purge themfelves from dealing in foreign Trade, and affolzie the Defenders from Repetition of Bygones, and decerns accordingly. But thereafter upon a Representation offered for the Purfuers, his Lordship was pleafed to take the Cafe to Report.

And in the firft Place, the Lords will be pleafed to know, that it is a Fact too notorious to be denied, even by the Purfuers themfelves, That they actually carry on a Trade, and that a very confiderable Trade with the Ships that pafs through this Frith, or touch at the Port; this is admitted in the Purfuers own Libel, which bears, " That the Purfuers are Inhabitants of the Village of *Stromness*, fituated
" upon the South-west Corner of the greateft Island called the *Main Land* of *Ork-*
" *nay*, and in the very *Gut* or *Passage* of the *Pentland Frith*, whereby the Pur-
" fuers and other Inhabitants of this Village have Occafion to furnifh *Vi-ctual*, and
" other Provisions to Ships of all Nations that happen to touch there in the Courfe
" of their Voyages, and to take Money or Goods in Exchange for what they fo fur-
" nifh, which Situation and Traffick has made this Place confiderably to increafe
" of late Years, &c."

And as the Purfuers cannot deny, that they carry on a pretty confiderable *fo-*
reign Trade, as little can they pretend, that they have any other Right to carry
it on, but as *Burgesses* of the Town of *Kirkwall*; for it is certain that this Village
never had any Communication of Trade from the Royal Boroughs in terms of the
Act 1693; and therefore if they cannot juftify their Title to Trade under the Cha-
racter of *Burgesses* of *Kirkwall*, they muft admit, that they have been *immemo-*
rially carrying on an *illicite Trade*, and continuing in a *perpetual Transgression* of
the feveral Statutes which have been made for afcertaining the Privilege of foreign
Trade to the *Burgesses* of Royal Boroughs allenarly.

On the other hand, it is equally true, that it has always been understood by the
Purfuers, as well as by the *Defenders*, that this Trade was lawfully carried on
by the *Purfuers*, and other Inhabitants of this Village, as *Burgesses* of *Kirkwall*;
and that upon that Account they were fubject to a Proportion of the Cefs in the
fame Manner as the other *Burgesses* who refided within the Burgh of *Kirkwall*;
that fo it has been understood by all Parties, is evident from the *Defenders* acqui-
efcing in the *Purfuers* Trade without Challenge, and the *Purfuers* *immemorially*
submitting to pay their Shares of the Cefs impofed upon them without any Obje-
ction.

And thefe being the Circumftances of the Cafe, the Argument pled for the *Purfuers*,
as the Ground of their Declarator and Reduction, is truly no other than this, " That al-
" tho' they have been in ufe of carrying on a *foreign Trade*, tho' they are not intitled
" to the Privilege of the Communication of Trade as Inhabitants of *Stromness*,
" yet if they have been guilty of *illicite Trade*, that will not fubject them to pay
" a Part of the Town of *Kirkwall's* Cefs. The Penalty of *unfree Trade* is the
" feizing and efcheating of the Goods in terms of the Act 1672, but it does not
" oblige the Trader to pay any Part of the Cefs impofed upon another Burgh; that
" as *Burgesses* of *Kirkwall* they have no Right to Trade in *Stromness*, or any
" where elfe without the Bounds of the Royalty of *Kirkwall*, and as little can
" they, when living without it, be fubjected to any of the Burdens impofed on
" that Burgh. And for proving that *Burgesses* are neither intitled to Trade, nor
" fubjected to Burdens, unless they refide within the Burgh, the following Acts
" of Parliament were appealed to, the 153d Act, Parl. 12. *Ja. VI.* 275th Act,
" Parl. 15. *Ja. VI.* 6th Act, Parl. 19. *Ja. VI.*"

But the *Defenders* beg leave to differ from the *Purfuers* both in the Pofition they
lay down, " That a *Burgess* cannot trade if he refide without the Royal Burgh," and
in the Confequence they draw from it to this Cafe. With refpect to the *firft*, the
Defenders cannot fee that it is proved by any of the Statutes they have condescend-
ed on for that Purpofe. By the 152d Act, Parl. 12. *Ja. VI.* the Privilege of Trade
is given to the *Burgesses* of Royal Boroughs without Limitation, whether they re-
fide within the Burgh or not. The Act recites, *That by divers Acts of Parlia-*
ment it had been statute, That no Perfon within this Realm fhould exerce the
Traffick of Merchandize but the Burgesses of free Boroughs; and confirms the
faid Acts with this Addition, *That whofoever exercifes the faid Traffick of Mer-*
chandize, not being free Burgesses, their haill Goods and Gear fhall become in
Efcheat, &c. Here both the Prohibition and the Penalty are declared only to
affect

affect such as are not Burgesſes; but they, whether they reſide within the Borough or not, are liable to neither.

Nor does the 153d Act of the ſame Parliament, referred to by the Purſuers, in any wiſe derogate from the above Statute, which immediately preceeds it. The Intention of this Act was not to determine who might trade, and who might not, this had been done by the Act immediately preceeding; but the Occaſion of the 153d Act was to determine certain *Exemptions* claimed by the Inhabitants of *Boroughs*, from the Taxations and Stents due to the *Borough*, and declares, That ſuch Exemptions ſhall not be admitted, but that all the Inhabitants ſhall be liable to bear their Share without Regard to any Diſcharge or Exception granted by the King or his Predeceſſors, excepting only, that it may be lawful for his Majeſty to exempt one Perſon out of each Craft for his own particular Uſe and Service, in caſe he ſhall ſo find expedient. But neither this nor any of the other Statutes referred to have ſaid, That *trading Burgeſſes* are not to be ſtented in caſe they reſide without the Burgh.

And indeed the Statute, which ought properly to be appealed to, for determining this Point of the Privileges of the Burgeſſes of Royal Burrows is the 5th Act Parl. 1672, where *ex profeſſo* this Matter is ſettled and determined; and from the whole Tenor of that Statute nothing can be more evident, than that the Privilege of Trade is given to the Burgeſſes and not confined to their Reſidence within the Burgh. Thus the Act Statutes and ordains, *That it is and ſhall be the Privilege of Royal Burrows, and no other Incorporation, or Perſon, within the Kingdom to buy or ſell, &c. And that no other Incorporation or Perſon within this Kingdom, ſhall have Power to import or export, &c.* And in the Penult Clause it is ſtatute and ordained, *That if any Man, not being Freeman in the Royal Burrows, ſhall be found to have in his Poſſeſſion any Goods or Commodities, &c. contrary to this preſent Statute, the ſaid Goods ſhall be eſcheat.* It ſeems very plain, That neither the Prohibition nor the Sanction of this Act, is directed againſt any of the Burgeſſes of a Royal Burrow, whether they reſide within or without it. In either Caſe it is declared competent to them, but to no other Perſon or Incorporation, within the Kingdom, to exerciſe the Trade and Merchandiſe therein ſpecified. And as this Act ſeems to be the *regula regulans*, for aſcertaining the Privileges of Royal Burrows; the Defenders believe it has never been altered in this Point by any after Statute. It is plain the Act 1690, was not intended to make any Alteration with reſpect to the Perſons, who ſhould be entitled to the Privilege of Trade, but only to explain and limit the particular Commodities, which it might be free to any other Subject to deal in, and therefore though it ſpeaks of Freeman Inhabitants of Royal Burrows, that is only exegetick referring to that which moſt frequently happens, but can never be conſtrued a Repeal of the former Statutes, which confer the Privilege of Trade on all Burgeſſes of Royal Burrows, whether they reſide therein or not.

And indeed were it otherways, there are ſeveral Royal Burrows in *Scotland* which ſhould be wholly deprived of the Privilege of foreign Trade, *viz.* all *Inland Burghs*, which are not ſituate upon the Coaſt-side, or upon ſome navigable River, from which Acceſs can be had directly to the *Sea*: For if a Burgeſs is not entitled to carry on Trade, but only within the Limits of the Burgh to which he *belongs*, as the Purſuers plead, the Burgeſſes of *theſe* Burrows can never carry on any *foreign Trade*: And yet it is believed it was never made a Doubt, That the Burgeſſes of ſuch Towns may exerciſe foreign Trade at the adjacent Sea-ports, where they find it moſt convenient, and even reſide there, if they ſo think fit, and yet ſtill retain their Privilege of *Burgeſſhip*. Of this there are Numbers of Inſtances in *Scotland*; Burgeſſes of *Edinburgh* trading and reſiding in *Leith*, even that Part of it which lies without the *Royalty*. The greateſt Part of the *Wine Cellars*, which makes no inconfiderable Part of their Trade, are ſituated without it, in that Part of *Leith* which lies within the Barony of *Reſtabrig*. Burgeſſes of *Glaſgow* in like manner trade, and ſome of them reſide at *Greenock*: And though neither *Leith* nor *Greenock* has the Privilege of Trade communicated to them by the Royal Burrows, yet no body ever doubted that ſuch Trade, carried on by Burgeſſes of the neighbouring Burrows, was lawful. And it is equally eſtabliſhed in Practice, That ſuch Burgeſſes are liable and in Uſe to pay their Share of publick Burdens to the Burgh to which they belong, and under whoſe Privilege only they can carry on their Trade.

And, in the next place, if it were a doubtful Point, Whether a Burgeſs could carry on Trade outwith the Burgh of which he is a Member; yet if Burgeſſes do in Fact

carry

carry on Trade in that Manner, when they have no *Title* to do it but as Burgeses of that Burgh, the Defenders are advised, that in such Case it would not be competent to them to plead the *Defect* of their own Title, were it liable to any: Your Lordships have found in many Cases, that a Party cannot profit himself by objecting a *Defect* in his own *Title*, even where it is clearly liable to one: For instance, a Creditor intromitting *sine titulo*, cannot object the Nullity of his own *Title*. A Cautioner for a Curator will not be allowed to plead, that the Curator had no *Title* to intromit because of a prior Act of Curatory, &c. And if such Objection was not allowed in those Cases, far less can it be in this, where the Objection resolves in the Party's declaring, *That he was guilty of a Delict or Transgression of the Law*. He traded apparently as one of the Burgeses of the Town of *Kirkwall*, he paid Stent to that Burgh in Consideration of his Trade; but now, in order to repeat the Stent he has paid, or to get free of it *in futurum*, he thinks fit to plead, that the Trade he was carrying on was truly unlawful and forbidden; that it is not a clear Point from the Statutes, Whether a Burges can trade, if residing without the Burgh? and therefore he cannot be liable to the Burgh for any Part of the Stent upon that account. It is humbly submitted whether such Plea, were there ever so much Dubiety in the Point with respect to the Title, ought not to be overruled, as contrary to all Equity and good Conscience, That a Man should profit himself by alledging his own *Transgression*, when he had a probable fair *Title* under which he seemed to act; when, upon the Faith of that *Title*, he has been allowed to act *unchallenged* for a Tract of Years, by the Parties who had otherways Right to challenge him; and still more, when that Title appears to be so strongly supported, both by Law and Custom, as it is in the present Case.

And to what has been already said, the Defenders shall only add, That this Point, which is now called in question by our Parties, has formerly received an express Decision of the Court in the very Terms we plead. It is observed by Lord *Dirleton*, Decision 430, 16th January 1677, the Lords found, *That a Burges of the Town, tho' he be not incola, if he trade, may be stented for payment of his Majesty's Taxation*. This Decision is in precise Terms of the Lord Ordinary's Interlocutor, finding, *That such Inhabitants of Stromness, as are Burgeses of Kirkwall, are liable to be stented, unless they can purge themselves of dealing in foreign Trade*: And it is evidently supported upon two good Grounds already hinted at; 1st, That Burgeses may trade even outwith the Burgh. 2^{dly}, That if this were doubtful, yet if a Burges does so trade, he will not be allowed to say, that he meant to carry on an unlawful Trade; it will be imputed to his lawful Title, and he will bear the usual Burdens accordingly.

The Pursuers were pleased to put the Case, "What if they were Burghers of different Burghs, would the Town of *Kirkwall* have any Title to their Stent, more than the other Burgh of which they were likewise Burgeses? That if they were guilty of unlawful Trade, it was equally in the Power of any other Royal Burgh, as of the Town of *Kirkwall*, to apprehend and seize their Goods? And that it was not in their Power to make it lawful, by communicating to them the Privilege of Trade, that Communication can only be granted by the Convention of Burrows?"

But the Defenders are advised there is no Weight in these Objections; it often happens, that the same *Merchant* will be *Burgher* in several *Burghs*, and carry on his *Trade*, perhaps first in one of them, and then in another; in which Case he will no doubt be liable to pay the publick Burdens only to that Burgh where he resides; and the Case is the same, when they chuse not to reside within the Burgh, but rather to carry it on at some Port in the Neighbourhood, they must pay the usual Burdens to that Burgh in the Neighbourhood of which they trade: So an *Edinburgh* Burges, who trades in *Leith*, will not have any Demand made upon him by the Town of *Glasgow*, tho' he may be also a Burges of *Glasgow*; and as little will the Town of *Edinburgh* make any Demand upon a *Glasgow* Merchant who trades in *Greenock*, tho' he was also admitted their Burgher. And as to what is said, That every *Burgh* had the Privilege of apprehending the Pursuers Goods as well as *Kirkwall*, your Lordships know that no *Burgh* can summarily apprehend and seize the Goods of unfree Traders, unless they are found within the *Burgh* or *Suburbs* thereof; and if they are not so found, the *Burrows* have no summar Remedy but only by legal Process: And in the present Case, *res ipsa loquitur*, that the Pursuers Goods must have been found a hundred times in the Town of *Kirkwall*, which lyes so near them, for once they would be found in any other Burgh in *Scotland*, from which

which they are separated by a pretty dangerous *Frith*: So it is to the Town of *Kirkwall* they owe the Tranquillity of their Trade, and the not apprehending their Goods, if they are supposed *illicite* Traders, which is the footing upon which their whole Plea depends. Tho' other Burghs had by Law an equal Power to apprehend the Pursuers Goods, if found within their Liberties, yet that is what in Fact could hardly ever happen.

And as to what they are pleased to say, with respect to the Communication of Trade, The Defenders agree, that that is a Privilege only to be granted by the Convention of Burrows. But first, the Pursuers had no need to ask any Communication of Trade in this Case, because they were already entitled to it as Burgeses of *Kirkwall*. Next, what Benefit could they have had, if, giving up their Privilege to trade as Burgeses of *Kirkwall*, they had applied to the Convention for a Communication of Trade to this Village of *Stromness*. A Proportion of the Stent is now imposed by the Town of *Kirkwall* correspondent to the whole Trade carried on by their Burgeses; If the Pursuers had sought a Communication to their Village of *Stromness*, it is not to be doubted, that the Convention would have eased *Kirkwall* of as much of the Cefs as they laid upon *Stromness*: This is what in Justice they behoved to have done, as *Kirkwall* paid the Cefs correspondent to the Trade of both formerly; and so the Case would just have come out the same as it is now, the Pursuers would have paid neither more nor less than they do at present, only they would have paid it to the Convention of Burrows instead of paying it to the Town of *Kirkwall*, because then their Right of Trade would have been derived from the Convention, whereas at present their only Title is in virtue of their Right of Burgeship received from the Town of *Kirkwall*, which makes it unnecessary for them to apply to the Convention for the Privilege of Trade, since they already enjoy it as Members of the Community of *Kirkwall*; and while they continue to do so, it is humbly submitted, Whether, with any Colour of Reason, they can refuse to pay those Burdens which they subjected themselves to when they entred into that Community?

With respect to the other Inhabitants of *Stromness*, who are not Burgeses of *Kirkwall*, The Defenders admit, that the Arguments hitherto laid before your Lordships will not apply, but they must submit to your Consideration, what shall be the Effect of the immemorial Use and Acquiescence in the Payment of Cefs: They are informed, that your Lordships have, in this very Session, found the Mechanicks who reside in the Village of *North-Leith*, liable to pay a Share of the Cefs imposed upon the Town of *Edinburgh*, though that Village never had the Privilege of Trade communicated to them by the Convention of Burrows, nor in fact do the Inhabitants carry on any foreign Trade, yet your Lordships found them subjected to a part of the Town of *Edinburgh's* Cefs, in respect they have been in use to pay the same immemorially, and your Lordships thought it would be of dangerous consequence to alter an immemorial Usage in a Case of that Nature, and that the Parties burdened could have no Reason to complain, after so long an Acquiescence: It is humbly submitted, if this Decision does not conclude *a fortiori* to the present Case, where a foreign Trade, and that pretty considerable, is admitted to be carried on by our Parties, who are now wanting to free themselves of the Burden imposed by Law upon all who enjoy that Privilege.

And lastly with respect to the Pursuers Claim for Repetition of Bygone Cefs, which they have paid immemorially without any Objection. This indeed sets the Iniquity of their whole Plea in a very strong Light, That after they have enjoyed the Benefit of a flourishing Trade as Burgeses of *Kirkwall*, and under the Protection and Acquiescence of that Burgh, and have paid their Share of the publick Burdens corresponding thereto, they should now pretend to repeat what they have so paid, when it is not in their Power to return the valuable Consideration they have had for it: This was so glaring to the Pursuers themselves, that in their last Representation they seemed to wave the Repetition of any Bygones paid before the Stewart-depute's Decree in *June 1742*, and insist only to repeat what they paid in consequence of that Decree: But as they cannot deny, that they have since that Time traded to a much greater Extent than corresponds to the trifling Sums they were bound to pay by that Decree, this Part of their Claim is as ill founded as the rest, and indeed the Defenders can have no doubt, that the Lords will find, that there is not the least Foundation for any of the Conclusions in the Pursuers Libel.

JA. FERGUSON.