

January 19. 1744.

'The Lord Ordinary makes *Avisandum* to the Lords with the former Minutes, and ordains the same to be printed, and put in the Boxes on *Thursday* next, being the 26th instant to the reported next Day, and allows either Party to put in what farther Memorial they think proper, and to prefix this Order to the printed Minutes.'

Signed BALMERINO.

MINUTES *John Johnston*, and others, Inhabitants of *Stromness*,

A G A I N S T

The Provost, Magistrates, and Town-Council of *Kirkwal*.

Actores *W. GRANT* and *LOCKHART*. Alteri *FERGUSSON* of *Pitfour* and *THO. HAY*.

**G**RANT resumed the former Procedure in Process, with the Remit to his Lordship to discuss the Reasons of Reduction, and insisted that the Decree produced, obtained at the Instance of *Robert Sutherland*, Collector of Cels, against the Pursuers, before the Steward-Depute of *Orkney*, ordaining the Pursuers to make Payment of the respective Proportions of Stent therein mentioned, to be reduced, in respect the Process, whereupon the same proceeded, was most incompetent, in so far as the Pursuers are Inhabitants of the Village of *Stromness*, situate upon the South-west Corner of the main Land of *Orkney*, and in the very Gut or Passage of the *Pentland-Firth*, whereby the Pursuers, and other Inhabitants of this Village, have Occasion to furnish Victual and fresh Provision to Ships of all Nations that happen to touch there in the Course of their Voyages, and to take Money or Goods in Exchange for what they so furnish; which Situation and Traffick has made this Place considerably to increase of late Years, and which, it seems, has excited the Envy or Jealousy of the said Burgh of *Kirkwal*, which lies at the Distance of 12 Miles from *Stromness*; and therefore, as the Burgh of *Kirkwal* was vested with no Authority whatever to impose such exorbitant Stents upon the Pursuers, Inhabitants of a distant Village, or to exact any Stent whatever from them, insisted, That the said Decree be not only reduced, but also the Pursuers declared free from any such Exactions, and the Defenders decerned to repeat the Stents so unjustly decerned for by the said Decree, reserving to the Pursuers hereafter to insist for Repetition of preceeding Stents unjustly exacted and paid by the Pursuers, and other Inhabitants of *Stromness*, to the said Burgh of *Kirkwal*.

Answers *HAY*, That the Pursuers, the Burgeses of the Royal Burgh of *Kirkwal*, thinking it more convenient for them to carry on their Trade at the Village of *Stromness*, some Miles distant from *Kirkwal*, to a considerable Extent, both home and foreign Trade, they did, and have been in the constant and immemorial Use and Custom of paying Part, and relieving the Burgeses of *Kirkwal* of a Share imposed on them of the Land-Tax, effeiring to their Trade, and have likewise been in the constant Use of sending Delegates, or Persons commissioned from the Inhabitants of *Stromness*, to see the said Proportion annually and fairly stated; and therefore the Pursuers, nor none of the Inhabitants of *Stromness*, can take the Benefit of their own Deed or Delict, in order to get free of Stent, which they would be obliged to pay as Burgeses of *Kirkwal*, or as unfree Traders, since, without their having the Privileges, as unfree Traders, the Town of *Kirkwal* could have seized the Goods they traffick in; and therefore the Decree ought not to be reduced, far less the bygone Stent repeated; and, as this Action is without any Foundation, craved the Defenders be assolied therefrom.

Replies *GRANT*, That, altho' some of the Pursuers be Burgeses of *Kirkwal*, yet, as they do not reside there, by carrying on a Trade in that Burgh, they are not liable to bear any of the Stent thereof, nor is it in the Power of any Royal Burgh to stent the Inhabitants of any neighbouring Village or Town; such Privilege of unfree Trade, and being stented therefore, being only given and imposed by the whole Meeting of the Royal Boroughs of *Scotland*, annually met at *Edinburgh*, but cannot be laid on by any particular Burgh; nor can any bygone Practice be obtruded,

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since such Practice was wrong, and therefore ought to have been rectified; and the Pursuers, at the Time of giving out the Decreet against them, did not only object thereto as illegal and unwarrantable, but also did present a Suspension thereof, which the Lords thought not to be so regular a Way of applying, and therefore refused to pass the same, but allowed the Pursuers to apply for Reduction, which shews their Averseness to acquiesce to such Impositions, and therefore still insisted, that the said Decreet be reduced, and the Pursuers declared free from any such Exactions, and the Defenders ordained to repeat.

*HAY* duplies, That, by the Act 1672. the Privilege of Trade belonged to all the Freemen of Burghs Royal, whether resident in the Burgh or not; and tho' the Act 1690. seems to mention only Burghers Inhabitants as privileged, yet it does not appear, that it was the Intention of the Act to cut out Burghers, tho' not Inhabitants, from trading, which is sufficiently plain from the latter Part of the Act, allowing a Retail of foreign Commodities to those who bought the Goods from Freemen of Royal Burghs, bearing Scot and Lot therein, without Distinction, whether such Freemen were resident in the Burghs or not; and the contrary would have been very unreasonable, because Non-Residence in the Burgh cannot be a sufficient Cause for depriving a Freeman Burgher, who pays Scot and Lot in the Burgh, of the Privilege competent to Burghers of Royal Burghs; and it must follow from thence, that if such Burghers may trade, paying Scot and Lot, they must also pay if they trade; and provided such Burghers don't pay Scot and Lot elsewhere, they must pay it in the Burgh whereof they are Burghers, and it makes no Difference whether they reside 12 Miles or 12 Yards distant from the Royalty.

And so much has this been understood on all Hands, That the Inhabitants of *Stromness*, Burghers of the Town of *Kirkwal*, have been in Use to be stented immemorially alongst with the Burgh of *Kirkwal*; and not only acquiesced in and submitted to such Stents, but even were assistant to the Magistrates of *Kirkwal* in imposing and levying the same; and the Occasion of this Process is only, that one or two of the Pursuers having laid down a Plan for relieving themselves, by charging their Neighbours with more than their Proportion, finding that the Magistrates of *Kirkwal*, who discovered their Views, imposed the Stent equally and proportionally, they therefore struck out, to give the Town as much Trouble as possible.

2dly. Supposing, for Argument, that none but Burghers Inhabitants can trade, and consequently that the Burghers of *Kirkwal*, Inhabitants of *Stromness* could not trade, and that, if they did, their Commodities in Trade were liable to Escheat; and that they could not be stented, nor were liable to pay Scot and Lot in the Town of *Kirkwal*, on account of Trade which they could not carry on, yet they and the Magistrates of *Kirkwal* have been hitherto in the contrary Belief, and the Magistrates and Burghers of *Kirkwal*, having suffered them to trade, without prosecuting them for illicite Trade, upon their submitting to contribute to the Payment of the Stent imposed upon the Town of *Kirkwal*, now, after they have escaped the Prosecutions, which, when their Trespases were recent, might have been effectual, the Discovery and Evidence being then easy, they come too late now to repeat Bygones, which were *fraudem facere contractui*, and to run away with the Profits of the Trade, and also with the Consideration paid for the Privilege of Trading; and as to the other Trifle contained in the Decreet craved to be reduced, they cannot, for the same Reason, get free of that, on Pretence that they have no Right to Trade, nor were liable to pay Stent for it: From the Libel they acknowledge, that they did trade considerably, which, they say, had excited the Envy of the Town of *Kirkwal*; and it were highly iniquous to make the Town of *Kirkwal* repeat a trifling Sum of Stent, when it is visible the Pursuers have traded in Goods several hundred Times the Value, which, when this Stent was first imposed, might, but cannot now be found out and confiscate.

*Avisvandum* to the Lord Ordinary.

December 13th, 1743. Lord *Balmerino*,

Having considered the above Debate, finds and declares, That the Magistrates of *Kirkwal* have no Right to lay any Part of their Cefs 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 assoilies the Defenders from Repetition of Bygones, and decerns accordingly.

Signed BALMERINO.