nine barrels of salt, left in the custody and cellars of Patrick Trail, in Kirkwall, by Captain Keith, and by him disponed to the pursuer. The defender alleged Absolvitor; because he, being collector of the customs in Orkney, had warrantably seized upon this salt, because there was no entry made of the ship that imported it.

It was ANSWERED, That the pursuer's author was *in bona fide* to buy the salt, seeing bulk was broken, and parcels sold to the defender himself, and many others.

It was REPLIED, That it is not the breaking of the bulk, but the not making of entry before bulk broken, that warrants the collectors to make seizure; neither did the defender give warrant to break bulk; but, on the contrary, offers him to prove, that, he being in Zetland, and the ship coming there, being *in* distress for want of vivers, and having no money to buy, and there being there no port to enter, did consent for the sale of ten barrels of salt, for the company's necessity, and sent a certificate to the customers at Kirkwall, that, accordingly, entry might be made there; which not being made, he did warrantably seize upon the salt in question.

Which the Lords found relevant.

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1675. *December* 15. The WRIGHTS and MASONS of EDINBURGH *against* The COOPERS, BOWERS, GLAZIERS, SLATERS, PAINTERS, PLUMBERS, and WHEELWRIGHTS of EDINBURGH.

THE wrights and masons of Edinburgh came to join in one society, upon occasion of an altar dedicated to St John, in the kirk of St Giles, for the light thereof, and other expenses thereanent, wherein they did concur in contributing; and thereafter have to this day continued in one incorporation; and had granted them, by the council of Edinburgh, power to make orders for ruling their trades, which are confirmed by King James the Fifth, King James the Sixth, and by King Charles the First and Second. There were also like privileges granted to the coopers; and they, the bowers, glaziers, and slaters, have been associated with the wrights and masons; and all of them have voted in concerns of all these trades, from the year 1572, as appears by their books, beginning that year, and continuing till now: but there is nothing else to show the time or terms of their incorporation; and particularly the admission of their masters of the several trades, their box-master that keeps the money of their whole society, or in the election of deacons, of wrights and masons preceding in the first place, and other trades subsequent. *In anno* 1583, there being a difference betwixt the merchants of Edinburgh on the one part, and the trades on the other, anent their interests in the magistracy, they both submitted to the arbitrament of King James the Sixth, who, with advice of some of the statesmen and lawyers for the time, gave his decreet-arbitral, commonly called *the sett;* by which he determines,—That there shall be only fourteen crafts who shall have power to choose deacons, *viz.* wrights, masons, &c.; of which deacons, eight shall be upon the ordinary council, and the whole fourteen in matters of special importance, expressed in the sett; and, for the annual election of these deacons, the council

are to give to the crafts a leet of three persons, out of which they are to choose their deacons.—The wrights and masons, and the other trades of their fraternity, have jointly chosen their two deacons, which are called the deacons of wrights and masons; and, *in anno* 1665, one of the other trades was leeted by the council, and another *in anno* 1673; and, after the leet was voted, the deacons of wrights and masons, when they presented their deacons to the council, protested against the leeting of any but wrights and masons. *In anno* 1611, there is a decreet-arbitral in the books of the deacon-convener, in the Magdalen Chapel, bearing a reference between the wrights, masons, bowers, slaters, and others, on the one part, and the coopers on the other, to the twelve deacons of the remanent trades; who do determine, That the coopers are a part of the corporation of the wrights and masons, and are not only pendicles thereof; and that they have equal interest with the wrights and masons to be elected deacons. But in the books of wrights and masons there is no mention of this reference or decreet. There are now mutual declarators at the instance of the coopers, bowers, &c. against the wrights and masons, that they have right to be elected deacons of the wrights and masons, and their whole incorporation;—and, at the instance of the wrights and masons, that they have no right to be elected deacons.

It was ALLEGED for the coopers, &c.—That it being notour and acknowledged that there was an incorporation of the wrights, masons, coopers, bowers, &c. past memory of man; having a common and equal vote in all the interests of the several trades, and particularly in the election of deacons; as appears by their books; that therefore they were eligible to be deacons of these trades; for, in all associations, law presumeth equality, unless an unequality or special privilege, by paction, law, or custom, appear in the contrary: and, more particularly, law presumeth that all that do elect may be elected, unless an incapacity appear in the contrary; but here it is acknowledged that all these trades are incorporate in one society, and always have voted the deacons; and, therefore, any of them may be chosen.

It was ANSWERED, 1*mo*. That, in all privileges and free donations, nothing is presumable but what is proven; and here it is evident that privileges were granted to wrights and masons, all one at first, which, being communicated to their inferior trades, can be extended no farther than what they have by concession from them, or by long possession thereof; but they cannot subsume that ever they were elected deacons, or that ever they were given out in leet to be elected, but twice of late, when there was division and faction in the town. *2do*. Though the incorporation might import a communication of all interests, yet that presumption is taken off by the King's decreet-arbitral; who determines, That none shall be elected deacons but they that are expert in their crafts; and that there shall be only fourteen crafts having power to choose deacons, whereof wrights and masons are two. And decreets-arbitral, being *stricti juris*, are to be interpreted literally; especially being done by a king, and so wise a king, with assistance of such able persons. And it were of dangerous consequence, upon interpretation, to unhinge that settlement against the literal sense thereof; for there can be nothing more clear than that two of the fourteen deacons must be the deacons of the wrights and masons, and expert in their own trade, and that among the fourteen trades the masons and wrights are two. And it is obvious to common sense, that a painter, plumber, a glazier, &c. is

neither wrights nor masons: And if the king had meant that these names should have comprehended other trades, he would certainly have added, "and their adherents." Yea, though the decreet-arbitral were not so clear, the nature of the thing imports that a deacon should be skilful in the chief workmanship that he is to oversee. And in heterogeneous societies there is not presumed an equality; but the nature of the privilege may exclude many members of the society; as when, in universities, a rector is to be chosen, scholars may vote and elect, but are not capable to be elected, because the dignity is not quadrant to their capacity. Even so, here, a painter or plumber can be neither thought capable to have inspection of the workmanship of wrights and masons; and, therefore, custom hath cleared the case, that these were never leeted to be deacons of the wrights and masons, but twice, and undesignedly.

It was REPLIED, That nothing alleged doth contradict that principle, that in societies all are presumed equal, except the contrary appear; and that all who elect may be elected, unless, by some specialty, they be rendered incapable: so that, though donations are not to be extended, yet, when they are granted, all particulars need not be expressed; but what is implied is granted, unless it be excepted. So that all the question is here, Whether there be any specialty to exclude these trades to be deacons appointed for oversight of the workmanship of the whole incorporation. And it is evident that there is none *ex natura rei;* because a painter or plumber is as able, and more able, to have the inspection of the workmanship of a wright or mason, than they are to have inspection of painting and plumbing. But the books of this incorporation make it evident, that all these incorporated trades do vote in the essays and sufficiencies of the masters which are entered to every trade; so that the deacons of this incorporation, whoever they be, may, and sometimes must, take the assistance of other masters in the corporation, in relation to the workmanship of the several trades. Nor are any, nor all of them, supreme judges; but are controllable by the magistrates of the burgh, though they be of none of the trades, who do take the advice of others skilled and unsuspected persons. And there is none contending that a slater or a plumber is a mason or a wright; but only, that they may be deacons, to oversee the masons and wrights, as well as they may oversee them. And as to the sett, there was nothing under the view and consideration of the King as to the difference of trades among themselves, or otherwise he would more clearly expressed the matter of deaconry. But seeing, before the King's decreet, there was an incorporation of the wrights and masons, and others of their fraternity, who used to elect deacons; and recent custom presumeth ancient; so that we have no ground to doubt but the election was then as now. For, albeit the King names a deacon of the wrights and a deacon of the masons; so that, if his meaning had been, that these two trades should elect their respective deacons, they behoved to have dissolved their former society and manner of election, and to have elected their deacons severally; yet they did make no alteration, but did elect unitely; wrights voting to the election of the deacons of masons,—and they to the wrights,—and the other trades to both: which clearly evinceth, that there was nothing intended nor acted to alter the capacity and way of election of deacons, but only to balance them with a proportionable number of merchants. So that, by fourteen trades, it cannot be understood that they were fourteen single homogeneous trades, but fourteen incorporations of tradesmen, as then they were; each incorporation having one

deacon; and the masons and wrights being united in one incorporation, because of their considerableness, having two deacons: or otherwise, as the other trades were excluded from being deacons by the sett, they behoved to be turned out of doors, and have no vote in the election, as not being of the craft of wrights and masons; and so have ceased to be a part of the incorporation of the city of Edinburgh, consisting of merchants and trades: and thus had all the other trades, which are not specifically named, been turned out, and the town been capable of no other trades than what actually then were, to the great detriment both of the chief city and country. But it is evident that they both retained the other trades incorporated which then were, and assumed others, as they were most congenerous to these fourteen incorporations; as the waulkers assumed the hat-makers; and the furriers the glovers; who both have been frequently deacons of these trades. And it is as heterogeneous to say that a belt-maker is a hammerman, who hath all along continued in that craft as such, and may be deacon of it, as that a slater may be comprehended under the craft of masons.

The Lords, having considered the whole matter, they found, by their books produced, that the coopers, bowers, glaziers, wrights, and slaters, were incorporated in fraternity with the wrights and masons, and did vote in all their concerns and interests; and nothing appeared of any limitation in their admission, or any incapacity to be deacons of the whole incorporation; and found, that the King's decreet-arbitral, by designing fourteen crafts, by the naming of the chief craft, did not exclude the rest that were incorporated with them, nor alter their capacity of electing and being elected deacons: and therefore found, that the council might put any of these trades in the leet, and they might be chosen deacons accordingly. But, as for the painters, &c. that came in after, they appointed the parties to be heard, whether they had the like capacity or not.

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1676. *January* 11. WILLIAM BRUCE *against* JAMES ALEXANDER.

JAMES Alexander having granted a bond to his daughter Janet Alexander, and being charged thereupon, suspends on this reason; That it was never a delivered evident, but was unwarrantably intromitted with by his daughter, being in a locked box of his, which she broke up; at least being in a coffer or trunk of his whereof she had got the keys, being in his family for the time; and, that she had left his family and married, without his consent, to William Bruce. All which he referred to her oath; at least craved her oath of calumny, and that witnesses, *ex officio*, might be examined how she came by the bond.

It was ANSWERED; That the bond, being moveable, did now belong to William Bruce, her husband, *jure mariti*, which is a legal assignation; and so his wife, as cedent, cannot depone in his prejudice; neither can her oath of calumny be admitted, for the same reason: But he is willing to depone that he got the bond from his wife, before the marriage, as her portion, and knew nothing of any unwarrantable way of coming to it. Neither did she marry without her father's consent or approbation; for he agreed to the marriage; and, by a minute of contract, which was drawn up by his warrant, was to have disponed his