

an action for damages against his heir: It was yielded on all hands, that,---as to any pain or punishment, it could not be sustained after the party's death, except only *in crimine perduellionis*. And, on the other hand, it was yielded, that, whatever *pervenit* to the heir by that delinquency, he behoved to refund it; but the question was,—if he could be any further liable. The Roman law required that there should be *lis contestata cum defuncto*. But that was judged a nicety which the equity of our times has repudiated.

The Lords thinking the case singular, where there was no decision either way in our law, and that there was a parallel depending before the Parliament, at the Earl of Argyle's instance, against the judges' heirs who condemned his father, they remitted this case also to the High Court of Parliament.

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1696. *February 7.*—In the action for damages pursued by Gordons of Rothe-may and Park against Abernethy of Mayen, mentioned 3d January 1695; Mayen, in a petition, alleging that they were adducing sundry inhabile suspect witnesses to prove the fact, he craved a diligence to cite witnesses to prove his objections against them.

This the Lords demurred on, as not usual in civil causes, but only in criminals, where the diets were peremptory and short; and if they should depone falsely, they had a legal remedy by reprobator, and might protest for the same; but if witnesses were allowed to prove infamy against thir, why might not also witnesses be craved to reprobate their testimonies? which would make a vicious circle.

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1696. *February 11.* ELISABETH SLIT and DICKSON *against* WILLIAM BUNTEIN and JOHN MAXWELL of MIDDLEBY.

ELISABETH Slit, and Dickson her husband, against William Buntein, and John Maxwell of Middleby, agents, upon a summary complaint against them, as members of the Session, that they had taken advantage of them, and caused them enter into a fraudulent and disadvantageous bargain, whereby the said Elisabeth had made over all the benefit of her brother Captain Slit's executry and succession to Middleby, upon his back-bond to pay her the free half of it, he retaining the other half, but defraying all the expenses out of his half; by virtue of which transaction, he craved retention of the half of 7000 merks he owed Captain Slit himself; which Elisabeth and her husband contended was never their meaning, but only to give him the half of what he should recover out of third parties' hands; and that their agreement, (whatever the *cortex verborum* might say,) could never in reason extend to what he had in his own hand, which could stand him no expense in recovery.

ANSWERED,—They could not be ignorant of the sum he was owing; for it is confirmed in the testament, and their own son is cautioner; and they were present at composing the dues; and she has judicially ratified the assignation, and has accepted partial payments homologating the transaction; and, by letters, acknowledged the sense of gratitude they had for all his favours.

REPLIED,—Tacit consent and acknowledgment by homologation is never in-

ferred where ignorance appears, or it can be ascribed to another cause ; as was found 6th July 1661, *Telfer* ; and December 12, 1665, *Barns* ; and it is plain thir poor people never understood to give him the half of his own sum, *viz.* 3500 merks, for discovering little or nothing, unless we suppose them to be idiots.

As to William Buntein's gratuity, it was but 300 merks,---a small remuneration for his bygone services, and giving up the papers ; and the Lords assoilyied him. But, as to Middleby's agreement, the Lords thought it not so fair, and therefore refused to extend the contract to his own sum, or to allow him the half of it ; but declared, though they reponed the complainers, yet he might retain his pains and expenses, to be modified by the Reporter. Some moved, that the witnesses in the back-bond might be examined, whether it was not revealed to them, that he was debtor himself in 7000 merks without any concealment ; but the Lords thinking there was *dolus ex evidentia rei*, they refused to take any farther expiscation or trial.

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1696. February 12. MR JOHN BUCHAN, Agent for the Royal Burghs, *against* The TOWNS of MUSLEBURGH and DALKEITH.

Mr John Buchan, Agent for the Royal Burghs, against the Towns of Musleburgh and Dalkeith, for paying a proportion of the burghs' stent and taxation, or else desist from all trade, either of export, import, or retailing, conform to the clause in the 31st Act of Parliament 1653, anent the communication of trade.

ALLEGED, *1mo.* That they were content to be regulated by the Act 1690, anent the trade of the royal burghs ; and that the contract betwixt the burghs and Mr John Buchan could make no innovation thereof ; and the Act in 1693 has only ratified the said contract, but derogates nothing from the Act 1690. *2do.* That, by King David Bruce's charter, *anno* 1364, to the four burghs belonging to the Abbacy of Dunfermling, *viz.* Dunfermling, Kirkaldy, Queensferry, and Musleburgh, and many Acts since, they have the full liberty of trade with any other burghs in the nation ; and so were *in bona fide*, and ought to be assoilyied from bygoners.

ANSWERED,—The inequality of all the old acts giving the royal burghs the whole trade was, that it established a monopoly to the exclusion of others ; and the iniquity of the 5th Act 1672, was, that it robbed the burghs of their privileges, and communicated the same to the burghs of regality and barony, without imposing any part of the burden annexed to these privileges, but leaving the same to be wholly paid by the royal burghs : But now, by the Act 1693, all thir inconveniences are cured, and trade is communicated and diffused, they always bearing a proportional part of the burden, (but prejudice of the privileges and encouragement given to manufactories ;) and if ye decline the *onus*, ye must not have the *commodum* ; ye must desist from trade either in gross or retail. And, as to the Town of Musselburgh's charters, they were but *periculo petentis et salvo jure*, and taken away by subsequent laws : Neither could the king give them the trade due to royal burghs, in prejudice of the *jus quæsitum* to them ; and his grants must be understood *in terminis juris*.

The Lords found the standard and rule of trade now betwixt the royal