

1701. *February 20.* FOTHRINGHAM of POURY *against* KINLOCH of KILRY and FOTHRINGHAM, his Mother.

CICILIA Fotheringham, sister to the Laird of Poury, being first married to Doctor Kinloch, Laird of Kilry, and being left with several children, she next marries Ogilvie of Murtle; and a controversy arising anent the custody of her children at Privy Council, it ends in a transaction, by which they are allowed to stay with her till they were twelve years old, within two years of their choosing their curators, and then they were to be sequestered in some indifferent friend's hand, that they might not be influenced in the freedom of their election; and she was to have an allowance for their aliment till that time. The children being boarded in schools in Dundee, their mother and her second husband cause take out brieves from the Chancery for choosing curators to the eldest son, and thereon cite Poury, as his nearest of kin on the mother's side, to be present, in terms of the Act of Parliament 1672; who gives in an advocacy of the brieves, on thir two reasons:--*1mo.* That this was against the faith and design of the contract past betwixt them for securing the children from impressions in electing and naming their curators. *2do.* That it was illegal, and an anticipation, the boy not being fourteen full till March next, and done to surprise them.

The Lords, to obviate all designs, advocated the brieves, and, in the meantime, stopped the election.

It might be fit, by an Act of Parliament, to secure minors against this hazard in being trepanned and imposed on in making the nomination of their tutors; experience showing how oft their simplicity and credulity is abused in that matter, to their great prejudice. It is true, the 8th Act of Parliament 1696 allows the Lords to remove curators, or to find better caution, where their condition begins to fail: but this is not an adequate remedy for the disease; importunity, flattery, and crafty insinuations being as like to prevail on a weak minor as upon persons on deathbed; which is prevented by a prohibition.

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1701. *February 21.* ROBERT MALLOCH *against* The MAGISTRATES of EDINBURGH.

THE Town-Council of Edinburgh having, about 19 or 20 years ago, opened a new port at the foot of Halkerston's Wynd, for the conveniency of those who went on foot to Leith; and Robert Malloch having thereafter acquired some of the lands on the other side of the North Loch, and made yards and built houses thereon; and also having invited sundry weavers and other good tradesmen to set up at Moutrees-hills; and the deacons of crafts finding this prejudicial to them, and contrary to the 154th Act of Parliament 1592, discharging the exercise of craftsmen within the suburbs of burghs-royal, they neither bearing scot nor lot, nor paying stent, as the burghesses do; they prevail with the Magistrates of Edinburgh, in September 1700, a little before the election, to close up the port.

Robert Malloch presents a bill of suspension of that act and order, whereon my Lord Whitehill, then Ordinary, gives a sist of execution ; but either it was fully closed up before the intimation of the sist, or the tradesmen proceeded on their hazard. Robert Malloch, by a bill to the Lords, complains of this as a contempt of their authority, and contrary to law ; which being referred to the Lord Anstruther, then Ordinary on the Bills, it was ALLEGED by the Magistrates, That the opening or closing of their ports was a point of government and policy of the burgh, and wholly in their own power. They acknowledged such ports and entries to the city as had been used and possessed past memory, or during the space of forty years, could not be shut up ; but, within that space, they were judges to the convenience thereof, and, if they found any prejudice, they might alter it : and here there was a visible disadvantage, for their own tradesmen ran out to this place, and set up there, contrary to the foresaid 154th Act. And as to their working after intimation of the Lords' stop, they denied the same.

ANSWERED,—That the gates of cities were *juris publici*, and reckoned in law *inter res sanctas* ; and where there is once a *jus quæsitum* to the people, the same cannot be taken away to their prejudice. And forty years' possession is too long, seven years' being sufficient, in such cases, to introduce the benefit of a possessory judgment. And the old Act 154th is now derogated from by the 31st Act 1693, introducing a communication of trade to burghs of barony and regality, they bearing a part of the burden with the burghs-royal ; and this place of Moutrees-hill lies within the shire.

There also arose another debate between the Town and the said Robert.

He ALLEGED, That, in so far as his ground fronted with the North Loch, he had interest therein ; as it is with heritors bounding to the banks of rivers, sec. 23 et 24, *Instit. de Rer. Div.* And therefore he filled it up with earth taken out of a quarry, and turned over the Loch to the Town's side, to their prejudice. The Town, on the other hand, did stop the vent and passage of the Loch, which made it overflow and drown Robert's new acquired ground ; of which he likewise complained as an act of oppression.

They ANSWERED, The North Loch was wholly theirs, and within the royalty and contained in their charter ; and therefore he could drain no part of it, especially to make it regorge and inundate on their side.

The Lords were going to take trial by examining the witnesses ; but the Magistrates prevented it, by opening the said port of their own accord, without abiding an order, and let the sluice run.

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1701. *February 25.* ROBERT RUTHERFORD *against* SIR ROBERT DOUGLAS of AIRDIT.

I REPORTED Robert Rutherford against Sir Robert Douglas of Airdit, now of Gleanbervy, and the Children of Duncan Ronald, writer. Sir Robert, at Whitsunday 1699, left, in the hands of the said Duncan, his agent, £130 sterling, to be paid to one Ogilvy, on his clearing some right ; but that not being so quickly done, it is resolved that Duncan shall lend out the money, but so as it may be easily