but it appeared that he knew, before the arrestment, that Mr Maule was only a *Trustee*.

1743. *June* 21. RANKIN *against* MORGAN.

THE Lords found, that a proprietor of a mill could not hold a multure court upon lands that were within the thirle but did not belong to him; and therefore reduced the decreet for abstracted multures *in totum*, and would not so much as turn it into a libel. The *ratio decidendi* was the common principle of law, *Extra territorium jus dicenti impune non paretur;* and some of their Lordships carried it so far as to say, that an astriction to a mill gave no jurisdiction at all over another man's tenants, who, for that reason, they did not think would be obliged to answer to a court held upon the proprietor of the mill's own lands.

1743. *June* . CRAFTSMEN of CANONGATE *against* HERITORS.

THE burgh of the Canongate (which is a burgh of barony, holding of the town of Edinburgh,) has been in use, time out of mind, to pay part of the cess of the town of Edinburgh, notwithstanding they have not the benefit of the act of communication of trade, and are not entitled to any of the privileges of the town of Edinburgh. The origin of this custom is not known, but this was not the controversy here. Of this proportion of the cess of Edinburgh, the craftsmen and mechanics of the Canongate had been in use to pay a share with the heritors of houses; this they thought a great hardship, considering that they had no privileges of trade, and therefore they brought a declarator of immunity, wherein they concluded against the heritors that they should be liable for the whole cess. But the Lords, in respect of the constant custom, time out of mind, presumed there had been some ancient contract or agreement betwixt the heritors and mechanics, and therefore assoilyied the defenders. Actores, James Balfour, Alexander Lockhart.

1743. *June* . THEODORE EDGAR *against* JAMES MAXWELL.

THIS was a question about making up titles to a tenement within burgh. The fact was this: In the 1595, the Magistrates and Town Council of Lochmaben grant a charter of the mill and mill-lands of Lochmaben to William Johnston, "*tenendas et habendas, de domino nostro rege, et de balivis et consulibus dicti nostri burgi, in libero burgagio, feudifirma et hæreditate in perpetuum;*" and the reddendo bears L.40 Scots annually to the town. In the year 1656, John John-

ston was served and retoured heir in special to his goodsire, William, and was infeft *more burgagio, i. e.* as in a burgage tenement, upon a precept forth of the chancery directed to the magistrates of Lochmaben. In the year 1695, Alexander Johnston, the son of John, made up his titles by taking a charter, from the town, of the mill and mill-lands, containing a clause of *novodamus*, and a ratification of all the rights granted to him or his predecessors. At the same time, there was thrown in a clause of *clare constat* that Alexander is lawful son and nearest heir to John Johnston; and, upon a precept in the end of the charter, Alexander is infeft, but not by the common clerk of the town, but by a common notary.

The question is, Whether titles were in this manner validly made up by Alexander? or whether the subjects were not still *in hæreditate jacente* of John the father?

It was OBJECTED,—1*mo*, That, as the tenements held burgage by the most ancient investiture 1595, and were in that manner transmitted to John in 1656, Alexander, the son, could not enter to them otherwise than either by service and retour proceeding upon a brief, or by a cognition, according to the custom of the burgh, which is called service by hasp and staple. This cognition was by an inquest of old; but though that is gone into disuse, yet it is still incumbent upon the magistrate who gives the sasine, to take some cognizance or trial of the propinquity; but to give infeftment by a precept of *clare*, without any service or cognition, belongs only to superiors, and not to the magistrates of burghs, who are no more than the king's officers and bailies. *2do*, Supposing the entry to burgage tenements might be by a precept of *clare*, yet the sasine following upon the charter and precept 1695, never can be sustained, in respect that it was given by a common notary, and not by the town-clerk; contrary to the Act 27, 1567.

On the other side, it was said that the holding in the 1595 seemed to be of a dubious and mixed nature, something betwixt a feu and a burgage-holding, and wherein the feu appeared to be predominant; for, besides the words of the charter above quoted, it bears in the beginning, "*arundasse, locasse*," &c., which are words peculiar to a feu-holding; besides, it did not seem to be a point so clear, whether the bailies of a burgh may not give a precept of *clare* even in burgage, since an infeftment by hasp and staple is upon the matter the same thing; and it would be extremely hard in a doubtful case, as this certainly is, to annul the rights of all the creditors of Alexander Johnston, and others deriving right from him. *2do*, It was affirmed and offered to be proven that the notary of the sasine was town-clerk; but, if the tenement held feu of the town, that was not necessary.

The Lords varied a little in this question, but at last they found,—That Alexander's infeftment, by a precept of *clare*, was null; and therefore the tenement was still *in hæreditate jacente* of John. They thought that the burgage predominated in the charter 1595, and as John, in the year 1656, made up his titles *burgagio more*, they thought that was sufficient explanation of the charter, and determined the holding on the side of burgage; and, if so, they were of opinion that the magistrates could not alter the holding, and take the tenement holding of the burgh. *Dissent. Elchies.* Actor, James Ferguson.