

No 5. ordinance and appointment, to declare the irritancy.—THE LORDS sustained the pursuer's interest to declare the irritancy.

*Sir P. Home, MS v. 2. No 644.*

1746. June 19. MARGARET KENNEDY *against* MR JOHN ERSKINE.

No 6.

An adjudication being craved against a person, as heir to another in an estate, the present possessor was allowed to object and to dispute the defender's propinquity.

JOHN BLACKADER, tailor in Canongate, gave bond in trust to Margaret Kennedy, upon which she proceeded to adjudge from him the estate of Tulliallan, as charged to enter heir to Sir John Blackader of Tulliallan, alleged to be his predecessor, that thereupon she might quarrel the titles of Mr John Erskine advocate to the said estate.

Mr Erskine appeared for his interest, to stop the adjudication, and offered to prove that there was in being a nearer relation of Sir John Blackader than the said John. But the pursuer alleging that the estate was a male-fee, and he was heir-male,

THE LORDS found it competent to Mr John Erskine, being in possession of the estate of Tulliallan by proper titles of property, to object that the person against whom the adjudication was craved, was not the nearest heir of the deceased Sir John Blackader, and that there was a nearer heir existing; but allowed the pursuer to be heard on this allegation, that the estate of Tulliallan was a male-fee.

*A.G. Lockhart. Alt. Jo. Erskine, sen. Clerk, Forbes.*

*D. Falconer, v. 1. No 119. p. 146.*

1756. January 9.

OLIVER COULT, Esq; and Others, *against* The TOWN of MUSSELBURGH.

No 7.

The inhabitants of a town bound themselves by oath not to sell their fulzie, but to persons residing within the liberties.

The neighbouring heritors, not having a direct interest, found not entitled to challenge the combination.

EVERY burgh of Musselburgh at his admission has an oath administered to him in the following terms: 'That he shall not sell his muck and fulzie to any but those who dwell within the burgh and liberties thereof.' And this oath being of ancient date, has constantly been administered, and due obedience given to it. Some neighbouring heritors who were prejudiced by this regulation, brought a declarator against the Town of Musselburgh, subsuming, That the oath was an unlawful restraint upon the liberty of the subject, and concluding, that the inhabitants were not bound to give obedience thereto. This cause being reported by the Lord Ordinary, it occurred to some of the Lords in point of right, that a burgh of barony may, like a baron, confine their dung to their own lands; and, like a baron, discharge the importation of ale; that a royal burgh being erected for the sake of commerce, differs in both particulars. In the

erection of a burgh of barony, the benefit of the baron is chiefly regarded ; and therefore, the Magistrates of such a burgh have all the powers of a baron acting within his own barony. A royal burgh is chiefly erected for the benefit of the burgesses ; and therefore, the Magistrates have no power by any by-laws to abridge their privileges. But the Court waved giving any judgement upon this point, finding a more obvious medium upon which to determine the cause. They considered that no direct detriment was done to the pursuers by this oath ; and therefore, that they had no direct interest to carry on this process ; that whatever consequential interest they may have, such interest is no sufficient foundation for an action. And accordingly the COURT refused to sustain the action.

No 7.

*Fol. Dic. v. 3. p. 367. Sel. Dec. No 97. p. 134.*

1760. February 5.

DANIEL CAMPBELL of SHAWFIELD and WILLIAM GRAHAM of GARTMORE *against*  
WILLIAM MUIR of CALDWALL.

BOYD PORTERFIELD of that ilk was vassal to the Earl of Glencairn in the lands of Nullishill, Gibliston, and others, in the shire of Renfrew.

The Earl disposed the superiority of these lands, in 1757, to his vassal ; and upon the procuratory in that disposition Mr Porterfield expedited a charter under the Great Seal ; but immediately thereafter, and without taking infestment on the charter, Mr Porterfield disposed the superiority of one part of these lands to Daniel Campbell of Shawfield in liferent, and to Lord Glencairn, and his heirs, in fee, containing an assignation to the charter, and precept of sasine therein, so far as related to that part of the lands ; and he, at the same time, disposed the other part of the said lands to William Graham younger of Gartmore in liferent, and Lord Glencairn, and his heirs, in fee, containing the like assignation.

Messrs Campbell and Graham having obtained themselves infest on their dispositions ; and their several proportions of the said lands being ascertained, by the Commissioners of Supply of the county, to be upwards of L. 400 Scots of valued rent, they both entered their claims to be enrolled in the roll of freeholders of that county, at the Michaelmas meeting 1759. Mr Muir of Caldwell stated sundry objections to the titles produced by them ; and these objections were sustained by a majority of the meeting ; upon which they complained to the Court of Session.

*Objected by Mr Muir ; imo,* The superiorities in question are part of the entailed estate of Glencairn ; and the Earl is, by the tailzie, which stands on record, laid under an express prohibition to sell or alienate any part of the tailzied estate, with the usual irritant and resolute clauses ; so that the Earl was

No 8.

Not competent to a meeting of freeholders to reject a claimant's title, on account of his author's being barred from disposing by a strict entail.