feu, yet the town holds it of the king,) where possession is sustained not only to clear the quantity, but even to constitute the very thirlage, and which use and wont in his Majesty's mill they neither ought nor could have altered or interrupted. To the *seventh*, their witnesses are most famous, and one of them is only tenant to Inches' mother, and liferentrix; and for the rest refers to the depositions.

The Lords found the feuers' allegeance of immemorial possession of the muttie at the third part of a peck sufficiently proven, and found the interruptions used by the town not sufficiently instructed; and, therefore, declared the said muttie, in all time coming, to be the third part of a peck, and allowed the same, *interdicto uti possidetis.* *Advocates' MS. No.* 380, *folio* 159.

[*See the following case, the other action betwixt thir parties.*]

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1672. MAGISTRATES of INVERNES *against* JOHN FORBES of CULLODIN, WILLIAM ROBERTSONE of INCHES, and OTHERS.

THE other action that was ventilated betwixt these parties this same winter, was upon this occasion. For maintaining the former plea, [see the preceding case,] about the muttie, the Magistrates of Invernes lay on a stent on the whole burgesses of the town, and in particular upon Cullodin, Inches, and the other feuars of their mills. The said feuars raised a suspension thereof upon thir grounds: that the said town, by their intolerable and arbitrary way of stenting, had uplifted from their vassals and feuars more than eight-score a month's cess, since his Majesty's restitution; and that the present stent was for prosecuting a most unjust law-suit against their selves, and to which they ought not to contribute, and that they saw no end of such unwarrantable exactions; and that in the manner of imposing it they had grossly contravened the rules of stenting prescribed by the Lords of Session in a former decreet *in foro* betwixt thir same parties; and that the said stent was most unnecessary, yea unjust, as to the causes of it, and most unequal, exorbitant, and partial, as to the adjusting and laying on of the several proportions. (*Vide supra, 9th July* 1670, *Magistrates of Montrose* against *Scots, No.* 70.) That being only feuars and vassals, and having no trade or commerce within the town, they cannot be liable to any stents imposed by the town's private authority, but only to those laid on by authority of Parliament or conventions of estate; and particularly could bear no part of their minister's stipend, they being heritors of the land-ward parish, and paying their proportions for their lands. Likeas they had raised a declarator, craving to have it found and declared, in so far as concerns their lands holden feu of the town for payment of a feu-duty, with this clause, *pro omni alio onere*, they are not subject or liable to be stented with the town in any of their private stents, but only such as are imposed by public authority, and whereunto the other heritors of the kingdom are liable: else royal burghs at their pleasure shall exhaust the property of their feuars' lands, and by their insupportable and reiterated taxes, and unequal proportioning, render them of no advantage to the feuars; and which is the very malicious design of the burgh of Invernes: because the feuars will not comply with all their unreasonable demands, they, out of resent-

ment, do constantly impose most intolerable stents, to force them to abandon and give up their property; and which will very effectually work their end, and make their feus altogether unprofitable to them, if they once be made subject to this their unlimited and uncontrollable power of stenting them; and which is a most gross and insolent extortion and oppression in them, and deserving a rectification for preventing the preparative.

Unto which reasons of suspension, and conclusion of declarator, it was ANSWERED,—That they opponed the decreet in 1664, wherein, after a most contentious debate, the Lords found Cullodin liable to bear a share of their private stents imposed for the necessary use of the burgh; and that in all stents imposed since that decreet, they have exactly followed the way prescribed therein; that the inequality could not be complained of, the same having been laid on by sworn stent-masters, of which number some of thir suspenders have been; and that they have paid their proportions of this very stent suspended, and which proportions amounted to a very inconsiderable thing,—Cullodin's being only L.4 Scots; that the causes of it were very just, their commonty being riven out and abused by thir feuars, and the common good of the town being so small and drained as was not able to maintain their pursuits; that it was noways presumable that the magistrates and Council, who bear burden as well as the rest of the inhabitants, would unnecessarily clog themselves with stents, only to be revenged on three men.

REPLIED,—That the excellent, just, and rational method set down by the Lords, in their decreet 1664, for imposing stents, was not in one point of it observed: in so far as it ordains, that before the town or Council impose any stent, there should be public intimation by touck of drum, to the whole inhabitants and others concerned to compear; and that they expound and declare to them the grounds of the stenting, and the necessity thereof; and to hear and satisfy the inhabitants their objections against the same; that they shall exhibit the books of their common good, and make it appear to all that it was exhausted and spent to the town's use, and not able to defray any of the just grounds of the present stenting; that the inhabitants shall see the stent-masters sworn; and that the roll of the stent shall lie in the clerk's hands four days after its finishing, and parties be admitted to see it, and heard to object against their inequality, &c. That it was a gross mistake to think the royal burghs had the power of stenting for their private use, as an act of jurisdiction; for from the common law, both D. and C. de *Vectigalibus*, it is most clear cities have no such power; and so Craig, *tit. de Regal.*, affirms the power of stenting, or imposing taxations, is only competent to supreme princes, *qui non recognoscunt superiorem;* yea by acts of Parliament none can impose taxes but King and Parliament, and the stents permitted to burghs, called in law, *collectæ et contributiones*, are merely founded in the acquiescence and consent of the burgesses concerned. But not one jot of this was observed. Was intimation made by touck of drum, *re integra?*—not at all; but, *ex post facto et dicis causa*, sent them through when the stent was imposed; no reasons expounded, no satisfaction given to the citizens' scruples, no probation that the common good was exhausted and unable, no access to the clerk's books, no redress to be had of exorbitancy.

*Vide infra Town of Abirdene* and some of the *Burgesses*, in *January*, 1678. See *John Boswell's decreet* against *the Town of Kirkcaldy*, in 1669, for overstenting him.

The Lords, before answer to the debate upon the suspension, ordained probation to be led by either party of the way and manner the town had used in the imposing of this last stent, to the effect they might by comparison find whether they had followed these just rules prescribed them in that their decreet.

I may imagine the town had neglected their pattern: but the declarator was the main business against it. They ALLEGED, 1*mo*, That it was *res hactenus judicata*, and they could never reclaim now; seeing by the decreet 1664, the feuars were found liable to contribute with the town in their private stents. 2*do*, They cannot be otherwise, because by the express quality of their feus they must be burgesses and inhabitants of their burgh, and their heirs must be burgesses and actual residenters within the burgh; secluding their wives and assignees, and their heirs female, and also their heirs male, who shall not be burgesses and dwell within their town and territory: and which qualities are also annexed to the hail feus of the burgh of Aberdeen, and accordingly, their feuars bear burden with them in all their private stents; but *ita est* thir persons, who are the towns feuars, are all burgesses and residenters within their town or territory, and consequently *qua* burgesses must be liable. That by the 276 act, James VI. in 1597, magistrates are allowed to stent all burgesses, &c.

ANSWERED,—That they could be in no other or worse condition than the other Burghs Royal their feuars, such as Edinburgh and the whole other Burghs, who acknowledged no private stents; and that they had bought their feu lands very dear, and at the full avail, and could not be more enslaved than tenants or tacksmen, who are not subject to the private stents of their masters and heritors.

REPLIED,—There was a speciality here, viz. the inherent and innate condition and quality of their feus, that they could only belong to burgesses; which made them in a different case from the feus of other towns, and bound their stents upon the feuars. 2*do*, Thir feued lands being a part of the forest of Draikies, are such as were originally given by his Majesty to the Burgh at its erection, and *intuitu* whereof they being the seventh Burgh are very high in the Burgh-tax rolls; and are holden by them burgage of his Majesty, their charter of it bearing *firmas burgales;* and so being holden burgage, are the proper subject of stenting.

DUPLIED,—That the restriction of these feus to burgesses imports nothing; for that was only to seclude clanned persons and Highlandmen: and I cannot see if the same were comprised by a stranger, or an heir retour himself in special to his predecessor, who neither of them were burgesses, how the town could refuse to infeft and receive them upon a charge: or if one of them now should renounce his burgess-ticket, it were ridiculous to think he had thereby lost his feu; seeing it was only a personal quality, and could not really affect the feu to make it liable to stents, which *de sui natura* is free. And that lately in a debate between *Kirkcaldy* and *Jo. Boswell*, the Lords found Jo. not liable in their private stents nor stipend, &c. *Vide Craig de feudo burgagio, pag.* 60, 68, and 281. That the charter of Draikies' forest, in 1591, bears a clear feu *reddendo*, L.36 of money, *nomine feudi firmæ;* and that the town's feus of that forest have nothing common with burgage holding, seeing the feuars entered never by the bailies, as the king's bailies or commissioners within burgh, as is done in burgage, but entered by the town as their superiors, and paid compositions. That they grossly impinge upon the principles of law, by confounding that which is holden in burgage and that which is holden

feu. In the first the king is only superior; in the second the town itself; and therefore, in the first, the bailies giving infeftment is not an act of a superior, but *nudi ministri*. *2do*, In burgage they neither do nor can exact any composition for entering vassals, or other casualities, but in feu holdings they do. *3tio*, Not one foot of burgage ever was or can be conveyed by a base or subaltern infeftment, but all summarily by resignations; but their feus may be subfeued, and require a charter. All which are clear demonstrations and convictions how downright an error it is in law to think thir feus are held by burgage, to draw in the feuars under the verge of their most abitrary stents; they being given out for payment of a feu-duty *pro omni alio onere*, and that for the full price, and so made the feuars' absolute property.

See this point very learnedly prosecuted in the informations; but it may be added, which is not informed, that there is no speciality in their tying their feus to the heirs male and to burgesses, seeing the feus of the town of Edinburgh's common burgh moor are let out with the same quality, and yet it is never once attempted to burden them with any stents imposed by the town's own private authority; and in those that are laid on by the Parliament, they go in with the shire of Lothian and not with the town; whereas thir feuars do not once reclaim against their stenting with the town of Invernes in the public taxations. See Hope's *Minor Practiques*, Tit. Of the Jurisdiction of Sheriffs, Burghs, &c. *Vide supra*, No. 284, [*Duff* against *Forbes*, 5th December 1671.] See the town of Edinburgh's statutes, *anno* .

TRIPLIED,—That it is denied the town could be compelled to receive an heir, compriser, or other singular successor, who was not a burgess, and that one renouncing his burgesship could retain the said feu unless he offered scoting, loting, watching, and warding with the neighbours; likeas the town of Invernes offered them to prove, that, in all the private stents that have been imposed within their burgh these forty years, and past all memory, their feuars did ever bear burden with them as a part of the town.

The Lords inclined to find the feuars, in the common strain of law, not liable to their private stents, yet laid hold upon this last allegeance of immemorial possession of their being stented with the rest of the burgh; and, therefore, before answer, ordained them to prove the said perpetual custom, and allowed the feuars to condescend on and prove their interruptions and reclamations against the same.

As the feuars proving the immemorial possession of the muttie at such a quantity gained them the former cause, though the quantity proven was disconform to the custom used in the rest of the mills of the kingdom, so here it is feared they be overtaken on the same head, and get on the finger-ends with the same measure they did met to others; and the town proving them and their authors to have been in constant use of being stented when the town was stented, (though the said custom quadrates with none of the feus of other burghs-royal in Scotland,) yet that shall be sufficient to wreath this slavery of being subject to their stents irrecoverably about their necks.

The probation adduced by either party upon the possession and interuptions is not yet advised. *Advocates' MS. No.* 381, *folio* 161.