

being accepted by his friends, and being most onerous ; for old Craighends then stood in the right of Cunninghamhead's estate, which he generously made over on the making that tailie. And the notion of *negotiorum gestio* is a pure chimera. Friendly offices can never be distorted to take away my gift, and all his actings have the plain appearance and air that he was acting for his own behoof. But, to mitigate the rigour, he was always ready to drop the gift, on his renewing the tailie ; and such amusements can never take away his gift.

REPLIED,—He knows nothing of the backbond ; and any contrivance betwixt them can never bind it upon him, especially being done *ex post facto*, and a clear after thought, which could never influence the gift. If the old tailie be good, it will stand on its own legs ; but its validity must be tried in another process, and cannot fall in here. And whatever inclinations Sir William may have to gratify Craighends, yet he will not be hector'd nor concuss'd to it. And if he designed the getting the tailie by his being donatar, he should have acted more openly, and not by a clandestine backbond. *Propositum in mente retentum nihil operatur.*

The Lords found the backbond did not oblige Cunninghamhead, unless his acceptance of it be proven ; but did not determine whether his tutors and friends communing for it would bind him ; though the Lords generally thought it could not : and farther allowed him to prove Craighends' acts of management and administration, either as *negotiorum gestor* or procurator ; and for him to adduce what documents he can to elide the same, and that he did not act as trustee, but *tanquam quilibet.*

*Vol. II. Page 754.*

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1712. July 16. The TOWN of EDINBURGH *against* The COUNTRY BREWERS.

By a charter, granted to the Town of Edinburgh by King James VI. in 1603, the magistrates are empowered to exact at their ports, on all ale imported from the shire, for a burden carried on a man's back, four pennies Scots ; and for a load on a horse's back, eight pennies ; and, by their golden charter in 1636, they are entitled to uplift all the petty customs they have formerly been in use and possession of, for mending their causeways, and supporting the other exigencies and incident charges the government of the town requires ; and both thir charters are ratified in Parliament, and clad with immemorial uninterrupted possession. But the way of vecture and carriage of the barrels of ale into the town being altered from what it was the time of those gifts ; which was by horses, on each side of which a four-gallon barrel was put, so that eight gallons paid eight pennies ; but now, the way of importing ale is upon sleds and stypes, whereon the brewers put two nine-gallon trees, which is more than double what of old they imported on the horse's back. And the Town, by a table affixed by Thomas Fisher, their chamberlain, having augmented the duty, conform to the quantity of ale imported in the sleds, the brewers reclaimed ; ALLEGING it was an unwarrantable exaction in the Town to augment their customs, contrary to their own charters, which limit them to eight pennies on each horse-load of ale. And though the manner of the carriage be now different from what it was then, yet that can afford no pretext to alter and raise the duty ; seeing their gift does not relate to the quantity of

the liquor imported, but only to the loads. So, whether it be imported on a horse or a sled, the Town can crave no more than what they have these forty years bygone exacted at their ports, which never exceeded eight pennies. And, by Act 46th, 1491, and Act 54th, 1587, all customs are discharged to be taken at boroughs but conform to the old law, under the pain of being punished as oppressors. And, to apply this to the present case, the brewers subsume, that, to raise the duties effeiring to the greater quantity of gallons imported, is plainly a new excise, contrary to their gift and constant use and possession, and condemned by the common law and the practice of all well-governed nations; for the instituting of tolls, tributes, and customs, is *de summo imperio et inter regalia reservata*; and both sovereigns and statesmen are so jealous of this prerogative, as one of the pearls of the crown, that subjects, exacting tolls at their own hand, have been found guilty of treason; as in the case of *Patrick Earl of Orkney* in 1616, and others; and the lowest that politicians go, is infamy and pecuniary fines. And that it is *de reservatis imperii*, by the Roman law, see *tit. D. de Publicanis et Vectigalibus*, and *tit. Cod.—Nova vectigalia institui non posse inconsulto principe*. And, by the feudal law, *Sextinus, de Regalibus, lib. 2, cap. 6, num. 14*, proves it. And, as to our own law, *Craig, lib. 1. Dieg. Ult.* is clear. So that use and custom is the only rule and standard of such exactions, and they can neither be augmented nor altered without the royal authority; this introducing a new burden on the subjects against their natural privilege of freedom and immunity: and such grants must be strictly interpreted, and not to be extended *de casu in casum*, or to things of a light nature, as Voet observes that *leges vectigalia imponentes non sunt extendendæ ad res similes iis quæ in catalogo rerum vectigali obnoxiarum continentur*. And, therefore, the gift, speaking only of a horse-load of ale, can never be extended to the number and quantity of the barrels; but whatever a horse and a sled bring in, though more than formerly, cannot be taxed beyond the eight pennies. And to augment it by the gallons imported, and that because eight gallons then paid eight pennies, therefore sixteen gallons now must pay sixteen pennies, and so on, is a bold extension of their gift, and a new exaction at their own hand with a witness.

ANSWERED,—The Town is well founded to raise the custom by the quantity of liquor imported, without regard to the ancient way of portage by horse-loads, when sleds were not used; for how could these petty customs be granted in 1603, but according to the use of vecture and carriage that was then in fashion, which was on horses' backs? And, therefore, to change the manner of importation to sleds, which carry twice as much, and yet to offer only the old duty, is *fraudem legi facere*, and can never be allowed to diminish or frustrate the imposition; so the quantity of the gallons must be the only rule: if eight gallons must pay, *ex concessis*, eight pennies, then, by a necessary consequence, sixteen gallons must be the double; and this is neither an alteration nor augmentation of the duty. If the Town exacted eight pennies for a four-gallon tree, that would indeed be an unwarrantable augmentation: but that is not so much as pretended;—so all their clamour and noise falls to the ground, and their Latin citations and texts of law, and authors, is only an empty flourish. Suppose they should bring in 20 or 30 gallons on a waggon, how unequal were it that they should pay no more than the brewer who imports only eight or nine gallons at a time! If one have a stronger horse, or a greater machine than his neighbour, and so imports more ale, and yet pays no more than he who imports the lesser quantity,

he may certainly undersell all his neighbours considerably ; which were an absurd inequality : and sure neither King nor Parliament ever dreamed, that, by changing the load to a sled, the duty should either be diminished or evaded.

The Lords found the Town's gifts were a sufficient title for them to impose their small duties upon loads and burdens of ale, for maintenance of their causeways and other incident charges ; and that carriages by sleds, not being then used, but of late practised for bringing in ale, the Town can transfer the duty from the loads to the sleds, and can exact eight pennies on each nine-gallon tree so imported, providing it do not exceed two pence for any draught, though never so great ; that being the duty shod carts pay, because they break the causeways more than other carriages do : and found the Town's exacting a less duty these forty years past, not relevant to restrict them to that lesser duty in time coming, seeing the portage by sleds has not been used these forty years bygone, and so not prescribed against the Town by their so long silence and acquiescence.

*Vol. II. Page 755.*

1712. July 18.

PITCAIRN *against* WEBSTER.

IN February last, Mr James Webster, one of the ministers of Edinburgh, and Mr Robert Freebairn, bookseller there, being accidentally in company of the magistrates, Mr Webster complained that Freebairn, in his auctions, sold wicked and prohibited books, and particularly Philostratus's Life of Apollonius Tyanaeus, wherein that vile impostor and magician is equalized, if not preferred to, our blessed Saviour and his miracles ; and which were greedily bought up by atheists and deists. And Mr Freebairn bidding him condescend, Mr Webster ANSWERED,—Such as Doctor Pitcairn, who is known to be a professed deist : and, for a farther proof of it, in that same auction, many striving for that infamous book, one regretted that there were none bidding for the Bible, the Doctor scoffingly answered, that it was no wonder it stuck in their hands, for *verbum Dei manet in æternum* : which was a direct ridiculing the Scriptures and the Christian religion. In the heat of this contest, Freebairn takes instruments on Mr Webster's words, and, carrying the relation to the Doctor, he raises a process against the said Mr Webster, before the sheriffs of Edinburgh, for redress of that atrocious injury, as tending to make him odious to all who own a God and revealed religion, and so ruin and break his employment. Of this pursuit Mr Webster raises an advocacy to the Lords, on this ground, that the sheriffs are not competent judges to verbal injuries, scandals, and defamations ; but that such do properly and solely belong to the commissaries ; to whom he craved this cause to be remitted.

ANSWERED,—They did not deny but the commissaries were competent judges to such actions ; but it was not privative and exclusive of others, who may judge in such cases as well as they : for the sheriff is the crown's ancient officer, long before there were any commissaries ; and are appointed for keeping the peace, and putting the laws to execution, and sit on all crimes except treason and the four pleas of the crown ; and, consequently, may punish verbal injuries. *2do*, The Commissaries' jurisdiction originally was nothing but a mere invasion and