

1781. *January 19.* Captain CHARLES NAPIER *against* ROBERT and JOHN BROWNING.

IMPRESS SERVICE.

The Exemption from being impressed, which is competent to the Masters and Mates of Trading Vessels of fifty tons and upwards, does not extend to persons of that rank when employed in smuggling.

[*Fac. Coll. VIII. 32; Dict. 6610.*]

BRAXFIELD. That the suspenders were smugglers, seized in the act of smuggling, is now proved by a decree in Exchequer importing what is equivalent to a condemnation. Masters and mates are not liable to be impressed; but here the master and mate plead that they are such on a smuggling voyage. This defence cannot be received, being an acknowledgment of turpitude. The captain of a smuggling vessel cannot plead legal privileges; just as in smuggling contracts we deny action, because the smuggler cannot plead on his own turpitude.

PRESIDENT. Pressing is a necessary legal evil. Masters and mates are exempted, not by any statute, but merely for the benefit of commerce; and accordingly, in practice, and by the orders of the Admiralty, they have been exempted: but still masters and mates must plead on the foundation of that exemption, which smugglers cannot do.

JUSTICE-CLERK. The vessel was taken in the act of aggravated smuggling. While possessed of a letter of marque to wage war against the enemies of the state, the crew waged war against the King's officers and the fair trader.

On the 19th January 1781, "The Lords found the letters orderly proceeded."

Act. Ilay Campbell. *Alt.* A. Elphinstone.
Reporter, Kennet.

1781. *January 31.* Sir JAMES COLQUHOUN *against* WILLIAM, DUKE of MONTROSE, and OTHERS.

SUPERIOR AND VASSAL.

Division of superiority null, when made without consent of the vassal.

[*Fac. Coll. VIII. 46; Dict. 8822.*]

MONBODDO. The case of *Sir John Maxwell, 1742*, related to a fiar; but that makes no difference, for a liferenter is proprietor to a certain extent. The

petition for the Duke of Montrose aims at tearing up the feudal law by the roots. The very statutes, which wisely varied part of the feudal law, show that *that* law exists. The whole argument proceeds on this supposition, that a liferenter of superiority cannot enter vassals. It has been found that, although all casualties were discharged, the power of entering vassals being reserved, was sufficient to entitle one to a vote. We neither ought nor can make any alteration in the law. Questions of conveniency or inconveniency belong not to us.

BRAXFIELD. The plea insisted in by the vassal is not captious. The *thing here* aimed at is a great evil. The right of superiority is the chief point of property. Men know not where to go for obtaining an entry. A parchment voter goes abroad, and no one knows where to find him. How much worse would it be were superiors multiplied without end? A right of superiority is an indivisible right; so that, if there is only one, it goes to the eldest heir-portioner. This has been determined over and over again. If I am bound to pay to only one man, by what title is it that that man can force me to go to half a dozen for my entry? All this is on the supposition that the petitioner is well-founded in his law, that the right of entry is in the *fiar*; but that I deny. If the power of entering vassals is not in the liferenter, what is his property? In *blanch*-holding the power of entry is a material part of the property.

JUSTICE-CLERK. If a liferenter has not the right of entering vassals, he cannot vote as a superior; for his liferent right must be as extensive in its nature, though not in its endurance, as the right of the *fiar*. My difficulty is as to the case of those persons who are made liferenters on lands having only one *reddendo*. One charter was granted by the Duke of Montrose; but may he not still insist on granting different charters? and may he not still execute that power he formerly had?

MONBODDO. This difficulty may be solved by a distinction: if superiorities are of the same kind, the power is lost when once waived: not so, if the superiorities are of different natures.

BRAXFIELD. There is no evidence of the lands having been feued out at different times. In one feu contract there may be different *reddendos*. I lay my judgment on the fact.

PRESIDENT. It hurt me much to see fourteen freeholds erected on eight pennies Scots. At the next occasion we shall have the *blanch* duty of a pound of pepper divided into sixteen ounces. Here there is an attempt to overthrow the feudal law. The framers of the act for abolishing ward-holdings meant not to abolish the feudal law. It has been found that the superior could not again divide the feu, unless it were shown that the subjects were originally contained in different charters.

On the 31st January 1781, "The Lords sustained the reasons of reduction;" adhering to Lord Gardenston's interlocutor.

Act. W. Baillie. *Alt.* H. Dundas.
