(who hath right by progress from one of these four partners, to an eighth part of the gift,) being charged by the Magistrates of Glasgow and their stent-masters, for payment of his proportion of stent for his trade; he suspended upon this ground, that the assignment in his favours did entitle him to an exemption from stent. But the Lords found, that transferring a share of the gift by progress to the suspender, did not transfer to him an immunity from public burdens. Seeing the heir of Andrew Anderson and his other partners do still claim to enjoy the same immunity and exemption. And albeit the sovereign hath power to name one of every employment to be his own servant therein, with special immunities and exemptions to that person, and such partners as he should assume; it were absurd to think, that that gift might be divided and subdivided *in infinitum*, or in so many parts as would turn the privilege to be universal. Andrew Anderson, or his partners, might indeed denude themselves, by assigning their share of the gift and privilege to another, who comes in their place; but could not both give away and retain the same privilege. *Dans et retinens nihil dat.*

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1711. *July* 17. The MAGISTRATES OF EDINBURGH, *against* The COUNTRY BREWERS AND HERITORS of the Shire of Edinburgh.

THE Magistrates of Edinburgh obtained a charter under the great seal, in the year 1603, granting to the good town the privilege of exacting a petty custom of eight pennies for each load, and four pennies for each burden of ale, coming in at the ports; when the ordinary way of importing ale to the town, was either by loads on horseback, consisting of two four-gallon barrels on hough-hams, or burdens on men's backs. In anno 1636, the town obtained another charter confirming the small customs, and all rights and privileges they were in possession of; and their whole charters and privileges were ratified in the Parliament 1661. The country brewers having fallen upon another method of bringing in their ale and beer to the town upon carts, sleds, slips, and otherways; the Magistrates and town-council altered their manner of exacting and uplifting the said custom or causey-mail; and by their act in January last, appointed their tacksmen to collect and exact for each cart-draught of ale two shillings Scots, and for each nine-gallon-tree brought in upon sleds, slips, or otherways, from any place without the town's privileges, eight pennies, and proportionably for greater or lesser quantities.

The country brewers suspended the act, upon this ground, that the magistrates of burghs could not at their own hand impose or exact any new stents, without being liable to be convened as oppressors of the lieges. Act 4. Parl. 4. James IV. Act 54. Parl. 11. James VI. And they had no warrant for exacting the said imposition: for any grant in a charter, not conform to former right is null. Besides, the imposition quarrelled is disconform to the charter 1603, which lays the custom upon the load and burden, without distinction of greater or lesser: whereas this imposition is upon the quantity of the liquor; [and] rising in proportion to it, turns a downright excise. No regard to the charter 1636, in respect that confirms only to the town the impositions they were in possession of; and they must prove

antecedent possession. Nor doth the ratification in Parliament (which passed of course, and gave no new right,) make the thing better than the town's rights and law made it. 2. *Et separatim*, if the town had ever any such right, they have lost it *non utendo:* by being in use to exacct only one penny instead of eight for the load, and one halfpenny instead of four pennies for the burden; at least this negative prescription qualifies and restricts the former titles to the latter exaction.

REPLIED for the Magistrates,—All the burrows in Scotland have no other warrant for exacting such customs and impositions, but such charters from the sovereign: and so this imposition falls not under the foresaid Acts of Parliament. Changing the manner of bringing in ale from loads and burdens to carts, sleds, slips, or otherways, doth not alter the nature of the imposition; so long as the same is within the quantity allowed to be uplifted by the charter. For if the charter, 1603, did not allow the custom and causey-mail to be exacted conform to the quantity of the liquor, that grant in favours of the town might be easily eluded, by changing the form of the cask, or manner of the carriage. Which right in favours of the town, hath all the consent of Parliament that could be had: and albeit, ratifications in Parliament pass often in course, they have many good effects: as not only to exclude the sovereign from quarrelling the right confirmed; but also to stop the mouths of subjects so long as no better right is produced. 2. The good town cannot be said to have lost the privilege of exacting the custom upon ale, by the negative prescription, *non utendo.* Because, 1. The causey-mail was always exacted upon carts that brought ale into the town; and the being in use of exacting it upon any one sort of carriage, is sufficient to preserve the town's right of exacting the custom upon the load or burden of ale: since the possession of a part of any servitude or imposition interrupts the negative prescription as to the whole: especially considering, that the exaction upon the load did cease only by the change of the manner of carriage, without any neglect on the town's part.

The heritors of the shire of Edinburgh compeared for their interest, and repeted a declarator in defence of the brewers, upon a contract in anno 1676, betwixt the shire, the College of Justice, and the town; whereby the town was to accept of one penny upon the pint of country ale imported, in full of all they could claim from the country brewers; in consideration of the shire's giving way to the grant of impost, in favours of the town, of two pennies upon the pint.

REPLIED for the Town,—The declarator, at the instance of the shire upon the contract 1676, cannot be received in this process: in respect it is a distinct action at the instance of different pursuers, upon a different medium, relating to a different subject, and containing a different conclusion.

The Lords found the town of Edinburgh's charters in the 1603 and 1636, and ratification of Parliament thereupon, are a sufficient title for the town to impose the small duties therein mentioned, upon loads and burdens for maintaining their causeys; and found, that sleds not being then used, and now much used for bringing in ale to the town, the town can transfer the duty upon loads to sleds, and can impose eight pennies upon the nine-gallon-tree brought into the town upon sleds. And found the town's exacting a less duty for forty years past, not relevant to restrict their title to that lesser duty by prescription. And repelled the

allegeance founded upon the contract betwixt the Commissioners of Excise for the shire, and the good town, in the year 1676.

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1711. *July* 21. Sir ANDREW KENNEDY, Conservator, &c. Supplicant, *against* Sir ALEXANDER CUMING of Culter.

SIR Andrew Kennedy gave in a bill representing, that the decreet pronounced against him in favours of Sir Alexander Cuming, 9th December, 1707, was, upon the petitioner's appeal, reversed by the Lords Spiritual and Temporal in Parliament assembled: who, 19th April last, declared and adjudged, that the commission granted by her Majesty to Sir Alexander Cuming is void, and that the commission granted the petitioner and John Vere Kennedy, his son, is still subsisting in full force; and ordered the Lords of Session to direct the expenses in these suits to be taxed according to the course of their Court, and paid to the petitioner by Sir Alexander Cuming. Pursuant to which decree of the House of Peers, the petitioner, 14th of June last, caused intimation to be made under form of instrument to Sir Alexander Cuming, that he was to insist, before the Lords in Scotland, the fifth of July instant, conform to the said judgment of the Lords of Parliament. Therefore the petitioner craved, that the Lords, in compliance with the said ordinance of Parliament, would please to direct and tax the said expenses, conform to an account extending to L.1500 Sterling in gross, and decern Sir Alexander Cuming to make payment thereof to the petitioner.

Some of the Lords were of opinion, that they might proceed to tax the petitioner's expenses without citing Sir Alexander Cuming, by order of their Lordships. Because it is not left to the Lords to determine if expenses shall be modified or not; but they are ordered to tax the expenses according to the course of their Court, which is to modify expenses *postquam conclusum est in causa*, before extracting decreet, without any new citation to the party to be decerned: and considering the connexion of the process first intended before the session, with the appeal, judgment, and order of the Peers to tax the expenses; both parties are now before the Session in the same state as if Sir Andrew Kennedy had prevailed against Sir Alexander Cuming in that Court. Besides, Sir Alexander Cuming being present in the House of Peers at pronouncing the decree, he was warned, *apud acta*, that the Lords of Session were to tax the expenses; which he was farther certiorated of, by the notorial instrument. But the plurality of the Lords refused to enter upon the consideration of the petitioner's expenses, till Sir Alexander Cuming be legally cited by an order of the Session, that he may come prepared to object against the quantity of the expenses to be modified: There being no process in dependence before the Session, the same having terminated by an extracted decreet; and the order to the Lords is not to tax expenses, but according to the course of their Court, which is by process upon lawful citation. Sir Alexander's hearing the decree of the House of Peers was no legal certioration, the