

1712. July 12. CRAIGENDS *against* CUNNINGHAMHEAD.

THE lands of Cunninghamhead holding ward, and the heritor dying in 1671, and leaving Sir William Cunningham, his son and heir, a pupil; William Cunningham of Craigends, his relation, purchases from King Charles II. the gift of his ward and marriage; and, about a year after, grants a backbond, bearing, that he had taken the gift for security of a tailyie of the estate of Cunninghamhead, made to his predecessor in 1604, failing of heirs male of the then Cunninghamhead's body: and having required this Sir William, now of Cunninghamhead, to renew the tailyie in the terms of the backbond; and he declining to do it, Craigends raises a declarator of the avail of the ward and marriage; but with this qualified alternative conclusion, that either the casualties foresaid be declared to belong to him, and the same to be modified, or else that Sir William Cunningham be decerned to grant and subscribe a sufficient tailyie, failing heirs-male of his own body, in favours of Craigends, conform to the backbond; in which case he is willing to discharge the ward and marriage.

ALLEGED for Sir William,—There can be no declarator against him; in regard the gift was taken in Craigends' name, for Sir William's behoof, he always being reimbursed of all expenses paid out for obtaining it; which was 13 or 14,000 merks, paid to Bruce, Earl of Kincairn, who then had the gift of all compositions for wards and marriages; and which sum was faithfully repaid to Craigends, as *per* his discharge is proven. And that he was no more but trustee and fiduciary in this case, is evident from thir documents and circumstances, *1mo*, He had a general management in Sir William's father's time, and was his *negotiorum gestor* in componing with his creditors, and selling his lands of Polkenny to pay his debts. *2do*, After his death he continued to manage the pupil's affairs; and though he caused expedite a tutory in Cunningham of Ashinyard's name, yet this was a mere blind, for Craigends acted all; for he depursed the expenses, and gave a bond to warrant the nominal tutor. And, when it expired, he became his curator, and married his mother. *3tio*, When Sir William came to be major, he gave in his accounts, all written with his own hands, and particularly the great sum paid for the gift; of all which he got payment, and gave a discharge, without once mentioning his backbond, farther than that he moved Sir William might renew the old tailyie; which he refusing, he accepted his money without any more ado. And, as to the backbond, Sir William never heard of it till of late, far less accepted it. And the gift being originally a trust, Craigends could never alter nor invert it by a posterior deed of his own, without Sir William's consent; for *jus semel mihi quæsitum, sine facto meo a me auferrî nequit*.

ANSWERED for Craigends, He denied the trust, and acquired the gift *tanquam quilibet*; and the qualifications to infer it are neither relevant nor true. And his counting with him, and receiving payment, was no passing from the backbond; but he had opportunity enough to crave implement any time before he denuded of the gift; which he is willing to do on his renewing the tailyie. And it was at the serious intreaty of Sir William's friends that he gave that declaration, that he would take no advantage of the gift, conditionally, that at his majority he should sign a new bond of tailyie; and he cannot repudiate it now,

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.*

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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