

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 aeternum* : 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

encroachment of the churchmen over the civil magistrates, when the papal authority usurped the eminence of a universal bishop: yea, in Justinian's reign, the *defensores ecclesiarum* are reproved for meddling with testaments, *l. 41. C. de Episcopis: Absurdum est clericis, si peritos se velint ostendere disceptationum forensium*. But, the Empire declining, they kept their grip of that, and of judging scandals, under the pretence of being the *curia Christianitatis*; and by degrees wined themselves into all matrimonial causes, divorces, bastardies, legitimations, adherences, teinds, benefices, stipends, &c. But Scotland and France, even under popery, preserved their rights so far as to cognosce many of these cases in their temporal courts: so only confirmation of testaments, divorces, &c. were left to the commissaries to judge in privatively *in prima instantia*; and the sheriffs are in daily use to fine and censure for verbal injuries.

REPLIED for Mr Webster,—The words libelled being only an injury consisting in words, and these dipping upon religion, there can be none so competent thereto as the commissaries, who are founded in the sole cognizance of such scandals: *1mo*, By their instructions recorded in the Books of Sederunt in 1666, where they are classed, in the same period, with confirmations, divorces, and other things clearly privative, and so must all be homogeneous and of the same nature. *2do*, Sir George Mackenzie, in his Criminals, *tit. Jurisdiction of the Commissaries*, lays it down for a principle, that the commissaries are the only judges competent to scandals and verbal injuries. *3tio*, By a late decision, *supra*, 17th July, 1711, *Sharp of Hoddam* against *Maxwell of Cowhill*, where opprobrious expressions were found not judgeable by the justices of peace, though uttered in their presence at the election of a member of Parliament, but only before the commissaries: where Mr Webster will be able to qualify that what he spoke was far from being *animo injuriandi*, but occasioned by Mr Freebairn's justifying his selling such wicked and forbidden books. And, whereas the sheriffs have sometimes judged such injuries, that was because the parties did not object, but prorogated the court, of consent; there being few judicatories who will not enlarge and extend their jurisdiction as far as they can; so this can never infer their cumulative power with the commissaries.

DUPLIED,—Sir George Mackenzie must not be taken in so nice precise a sense as to divest all other judges in the case of verbal injuries; for he confesses, there, that the privy council, as well as the commissaries, judged in such cases, and particularly in 1678, betwixt *Grahame of Boquhale* and *Johnston*, for calling a gentleman a thief. *Stair, lib. 1, tit. 9*, says, the commissaries are judges competent to verbal injuries, but does not call them the sole judges, and adduces the practice, *5th February, 1669, Deans* against *Bothwell*; which proves their competency, and no more. As to Hoddam's case, there is no consequence from the jurisdiction of a justice of peace, and a sheriff; who have a much ampler commission.

The Lords considered this process was managed with much zeal, and that Mr Webster was willing to give reasonable satisfaction; therefore they recommended to the Justice Clerk, ordinary in the cause, to endeavour to settle the parties amicably.