ANSWERED for the brewers,—As the instituting of customs and tolls, are *de summo Imperio*, Sixtinius *de Regal. Lib.* 2. *C.* 6. *N.* 14. *vid. Tit. ff. de Public. et Vectigal. Tit. Cod. nov. Vectig. Instit. non poss.* Craig, *Feud p.* 112. *in fin.*—so the adding or diminishing from, and the reforming or altering tolls or customs established by the sovereign's concession or ancient consuetude, is held to be an innovation and usurpation of the royal prerogative, *d. Tit. Cod. L.* 10. *ff. de Public. et Vectig.* punishable not only by infamy and fining, but even by death: *Minsiger Observ.* 29. *Lib.* 5. *N.* 3. *Farin. Quæst.* 172. *Part* 3. *N.* 67. And the exacting this double duty, for a load of ale of a double quantity or two nine-gallon-trees, is an alteration and augmentation of the custom by the magistrates' authority, which cannot be allowed.

REPLIED for the town,—It is not doubted but that the imposing customs belongs to the sovereign power, and that customs and impositions can only be altered or augmented by the supreme power: But here no custom is demanded, save what is granted by King and Parliament; and there is no material alteration of the impost of custom. This petty custom being given upon the load of eight gallons of ale, or upon the load of ale, as well known to be eight gallons; where two loads, or two nine-gallon-trees, are charged upon a sledge, it is but still the same custom, without alteration or augmentation, to exact sixteen pennies for the same, (as eight pennies formerly for the single load,) save that it is indeed made easier: so that all the brewers, Latin texts, and citations of authors, are only an empty flourish. Neither King nor Parliament ever dreamed that by removing this load to a sledge, or two loads to a sledge, the duty might be frustrated or evaded. Farther, that the quantity rules the matter, and that the King's grant is so to be understood, is evident from this,—that though nothing be determined in the town's charter and gift, with a relation to ale imported to Edinburgh upon carts; yet, because the ordinary draught in a cart is three eight-gallon-trees of ale, two shillings Scots, of duty upon the cart of ale, is established by custom and prescription; keeping always the same proportion that there is betwixt the burden and the horse-load: Although, if people have a mind to cavil, a cart-draught is frequently called a load.

The Lords found, That the town of Edinburgh can impose a greater duty upon the sledge, than upon the load, proportionably to the greater quantity brought into the town by the sledge, than the load; but not exceeding two shillings Scots for the greatest, brought into the town of Edinburgh, for a cart-load.

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1712. *July* 17. ANDREW CLERK, Burgess of Saint Andrew's, and ISOBEL REID, his Spouse, *against* the Creditors of BROADLEES.

IN the competition of the creditors of Broadlees, there was produced for Alexander Clerk and Isobel Reid, his spouse, an heritable bond of provision, with infeftment thereon, granted by Alexander Reid of Broadlees, in favours of his

younger children for 12,000 merks, whereof the said Isobel Reid, his daughter's share, is 3000 merks.

ALLEGED for the creditors,—Isobel Reid and her husband cannot crave preference upon the bond of provision, because the same is innovated, in so far as, in their contract of marriage, George Reid of Broadlees, Isobel's brother, had obliged himself to her for the like sum of 3000 merks; which she, with consent of her husband, accepted in full satisfaction of all executry, and portion natural, which might fall to her through the decease of her father or mother, and of all former provisions made to her by her father; and therefore discharged George Reid, and all other representatives of her father, thereof.

ANSWERED for Alexander Clerk and his spouse,—*Novatio nunquam præsumitur*, unless particularly expressed: *L. ult. C. de. Novat.* And contracts of marriage being reckoned *uberrimæ fidei*, it can never be supposed that, by this contract, containing no more than what Isobel Reid was provided to formerly, she was to renounce any former security. The adjected general clause, "of all former provisions," can be understood only of things of that same nature with those specially mentioned. The design of taking the brother bound for the 3000 merks, seems only to have been to afford immediate access against him, without a previous constitution, for payment of what he stood antecedently bound for as heir to his father. 2. There can be no novation, *nisi ubi prior obligatio perimitur; L.* 1. *ff. de Novat:* and here the annual-rent constituted by infeftment, could not be extinguished by the clause in the contract of marriage, but only by an express renunciation. The Lords have never found the accepting a new right in satisfaction of a former debt, to be an innovation thereof; except in the case of personal obligations, which are *ipso jure* extinguishable by a discharge, or *nudo pacto*, which infeftments of annual-rent are not.

REPLIED for the creditors,—The heir's new obligation being given expressly in satisfaction of the former, and it appearing to have been the meaning of parties not to corroborate, but to take away the former obligation; the same becomes extinct and innovated: 23d *July*, 1633, *Lawson* contra *Scot;* 6th *December*, 1632, *Chisholm* contra *Gordon.* As a farther argument, the term of payment of the tocher differs from the term of payment in the heritable bond, which is a distinguishing mark of innovation: § 3. *Instit. Quib. mod. toll. Oblig.* And a discharge, or innovation by accepting new security in satisfaction, doth extinguish *ipso jure* real as well as personal debts, as to the creditor himself; a registered renunciation being only necessary for certifying the lieges, and to secure against singular successors.

DUPLIED for Alexander Clerk, &c.—The exception upon this discharge of the bond of provision is taken off by this reply, That the money for which the discharge was made is not paid; and *qui ex contractu mutuo et correspectivo agit, nisi prius ex sua parte adimpleverit, a limine rejicitur.* So Dirletoun, *Tit. Mutual Obligements in Contracts*, holds that the compriser of a minute of sale will have no action for implement, unless he pay the price; seeing the price is the final cause of the disposition: and agreeable hereunto is the decision, 3d *December*, 1675, *Lady Musewell* contra *Creditors of Musewell.*

TRIPLIED for the creditors,—The Lady Musewell and the party contracting with her were under mutual obligements to perform deeds *in futurum;* whereas here is no obligement *in futurum*, but all transacted and performed *de præsenti.*

The Lords found, That the provision in the heritable bond by Alexander Reid to his younger children, is innovated as to Isobel Reid's share, by her contract of marriage: but allowed parties to be heard upon the import of *causa data non secuta* in this case. *Page* 617.

1712. *July* 23. The LORD and LADY ORMISTOUN *against* JOHN HAMILTON of Bangour, and his Tutrix.

THE Lady Ormistoun, and her husband, insisted against Bangour, as heir to the Lord Whitelaw, the lady's former husband, for payment of the expenses of the defunct's funerals, assigned by the furnishers to her upon payment.

ALLEGED for the defender,—No process can be sustained against him, for articles of expenses acquired by the pursuer; after the same were prescribed *quoad modum probandi*, in the persons of her authors, not being sued for within three years after they fell due.

REPLIED for the pursuer,—The expenses acclaimed, being directly and principally payable out of the executry, and this prescription not being an extinction of the debt, but only of the manner of probation by witnesses; the Lady Ormistoun, who, as come in place of the Lady Housil, the executrix, by assignation to the subject of the inventory confirmed, stood obliged to pay the defunct's moveable debts, might warrantably pay the accounts now pursued, after expiring of the *triennium;* since thereby she did but renounce a privilege, competent to her to claim or not, as she thought fit: nay, an executor must necessarily pay, even after elapsing of three years, any debt she is conscious to be truly resting; because the verity thereof may be proved by her oath.

DUPLIED for the defender,—1. The Lady Ormistoun's transaction with the executrix can only have effect betwixt themselves, and cannot entitle her to the privilege of the executrix; though her obligement to relieve the executrix, at the hands of the defunct's creditors, be a passive title against her. 2. *Esto* the pursuer were vested with the privilege of executrix, she could not apply any part of the executry to the payment of debts prescribed as to the manner of probation; seeing an executor's oath, though it may prejudice herself as to her proper interest, can never wrong the heir or creditors of the defunct: *March* 6, 1627, *Scot* contra *Cockburn; March* 13, 1627, *Ker* contra *Caringtoun.*

The Lords found the accounts of the funeral charges, contracted by my Lady Ormistoun, and paid without the three years, do not prescribe; but found the accounts of such charges where she was not contracter, paid without the three years, prescribed.

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AFFIRMED on Appeal,—*Vide* Robertson's Appeal Cases, page 61.