and these always 20 shillings, or a merk below the current prices: *2do*, If they were to pay the bolls, they cannot be obliged to do it in barley, because, though the ground now produces it, through their industry and expence of mucking, yet, at the time of the subfeudation, about 100 years ago, there was no barley then in Scotland; and the words of their charter are *tot modios hordei;* whereas barley is usually expressed by the words of *hordeum optimum;* and the feuers of Musselburgh, &c. pay no other. *Answered*, Whatever has been the Town's lenity, yet that cannot prejudge a community, and superiors may exact their feu-duties *in specie*, and no prescription can run against that; and it is ridiculous to think vassals should be allowed to offer other victual, or worse than their ground produces. THE LORDS found, though the Town should not be rigorous to their feuers, yet in law they may require the bolls themselves; and, in case of not delivery, they might exact the highest fiars *in modum pœnæ*. And the question arising, who should carry the victual? The feuers contending they were only obliged to deliver it on the barn-floor; the LORDS found where the superior dwelt within the barony, the vassal was not bound to go and seek him *extra curtem domini* (as the fedual law calls it,) but if he lived *infra baroniam* (as the Magistrates of Edinburgh did) then the feuer was bound to bring it to the superior; and likewise found, that these feus being perpetual locations, and *emphytheuses* for meliorating and improving of the ground, the superior had right to such grain as by the vassal's industry grew thereon; and found the public burdens and cess being imposed *intuitu* of the feu-duty, as well as the vassal's part of the lands, these burdens ought to be borne proportionally by the superior and vassal effeiring to their respective interests, the feuer being only like a *colonus partiarius* in the case. But in regard it was not liquid, the LORDS did not receive it here, but reserved to the vassals their action for constituting and dividing the same betwixt their superior and them. *See* PUBLIC BURDEN.—TACK.

No 6. not bound to seek him *extra curtem domini;* but if he lived within the barony, the feuer was bound to bring it to him.

Fol. Dic. v. 1. *p.* 296. *Fountainhall, v.* 1. *p.* 715.

1712. *January* 22. HAMILTON *against* LORD BURLEIGH.

No 7. Found in conformity with Rollo against Murray, No 1. p. 4185.

MARGARET HAMILTON and Mr David Orme her husband, having right from the late Marquis of Athol to some feu-duties due out of the Lordship of Falkland, pursue my Lord Burleigh, heritor of Freuchy and Newton, for payment of the feu-duties of these lands *personali actione* for many years bygone. *Alleged*, That for all the years since I bought these lands I am most willing to pay at the bar; but, for years preceding my purchase, I can never be personally liable; neither is the superior at any loss, for he has two remedies; he can either summarily poind the ground for his bygones, it being *debitum fundi* affecting the land, or he may adjudge, which will prefer him to all other creditors. I suppose, one acquires an infeftment of annualrent; he can poind for his by-

No 7. gones, but he will not make a new intrant possessor personally liable for the years preceding his entry; even so with a superior; for all personal actions arise *ex aliqua personali obligatione*. But here there is no foundation for any such conclusion against a purchaser *quoad* feu-duties preceding his right. The superior's interest is real *contra fundum*, and against all intromitters with the rents *quoad* the years they possest, but no farther. *Answered*, Superiors besides the foresaid two remedies conceded them, have also a third, making the intromitters with the rents liable *ad valorem* of their intromision for all feu-duties resting, though prior to their right; and which naturally arises from the tenor of their feudal contract; for though poinding secures the superior abundantly, yet the personal obligement on the vassal is the *jus pinguius*, and brings him sooner to his purpose. It is true, apprisers and adjudgers may have some pretence to debate this, being successors *ex alienatione involuntaria*, and lie under a necessity to take what they can get for paying their debts; but voluntary purchasers are bound to see these bygones paid and discharged, or retain a part of the price in their hands to purge them; and if they do not, they have themselves only to blame. Likeas, the clause *reddendo inde annuatim* ties the vassal as fully as if his charter were a bond; and the 4th act of Parliament 1669 has given the superior a farther privilege that he can poind summarily before the days of the charge are expired. The question is of no great importance as to vassals, seeing their ground must pay all bygones; yet the LORDS, by plurality, found the vassal personally liable, even for years preceding his purchase, the superior always proving he had intromitted with as many of the mails and duties as would pay these bygones; so by this interlocutor 39 years' feu-duties may be cast upon one year's rent, if its extent be able to pay them, and the heritor has uplifted it.

THE LORDS altered this interlocutor upon a bill afterwards given in.

Fol. Dic. v. 1. *p.* 296. *Fountainhall, v.* 2. *p.* 708.

*** Forbes reports the same case:

IN the action at the instance of Margaret Hamilton and her Husband, as having right from the late Marquis of Athol, to certain feu-duties out of the lands of Newton and Freuchy, against the Lord Burleigh and James Wright the present heritors, for payment of bygone feu-duties resting for years that their authors possessed these lands,

Alleged for the defenders; They being singular successors, cannot be liable by a personal action to pay feu-duties due for years before they had right to the lands, March 29th 1636, Cowan *contra* Elphinston, No 21. p. 202.; March 26th 1629, Rollo *contra* Murray, No 1. p. 4185.; January 30th 1639, Cockburn *contra* Trotters, No 4. p. 4187.; July 19th 1665, Winerham against the Lady Idington, No 5. p. 4188, because feudal contracts are now very rare, and cannot be pretended in the present case. The *reddendo* in charters is not a

No 7.

personal obligement, but a real right to the superior, to poind the ground for his feu-duties. It is true that annualrenters, who in their infeftments of annualrent have an implied assignation to mails and duties, may, by a personal action, recover the whole bygone annualrents due to them from one who hath had but one year's intromission with the rents of the burdened lands; but it is not easy to conceive, how a superior can pretend to have such an assignation to mails and duties implied in his right of superiority.

Replied for the pursuers; Seeing the rents of lands are liable to be poinded for all bygone feu-duties resting owing, intromitters with these, which are the subject of the superior's payment, should be personally liable; as annualrenters may, by a personal action, recover their whole bygone annualrents from any one who hath intromitted with as many of the rents of the burdened lands, March 15th 1637, Guthrie *contra* E. Galloway, No 4. p. 567. For however feus be generally now constituted by charter and sasine, or a writ flowing only from the superior, without any formal contract signed by both parties; there is yet a mutual obligation implied in the constitution of every feu, importing mutual prestations both upon the superior and vassal. And the superior as *dominus directus*, hath a more direct title to mails and duties, than any annualrenter; especially in feu-holdings, which are generally considered only as *emphyteuses*, and the vassal as *emphyteuta*, or a kindly tenant.

The Lords found, that the defenders are not personally liable, though it were instructed, that they had intromitted with as much of the rents as would satisfy the bygone feu-duties acclaimed.

Forbes, p. 584.

1738. *July* 13. Biggar *against* Scott.

No 8.
Personal action, for payment of feu-duties, against a tenant, falls upon the tenant's removal.

Though personal action be competent to the superior for his feu-duties, not only against the original feuer and his heirs *ex contractu*, but against their singular successors, the property being truly reserved in as far as relates to the superior's casualities, and therefore all intromitters being liable for the feu-duties, yet, in a process at the instance of the superior against the tenant of the vassal, the Lords found, 'That the tenant being removed before the process was raised, there lay no personal action against him at the superior's instance for payment of the feu-duty.'

The reason given was, that the personal action could only lie where the tenant's goods were attachable by action of poinding the ground, which they are not after his removal: Several of the Lords dissenting, who thought the distinction imaginary; for that if once action lay, it remained while the tenant was debtor in the rent to his master the vassal.

Fol. Dic. v. 1. *p.* 296. *Kilkerran,* (Feu-Duties.) *No* 1. *p.* 188.