

ed by burghs royal, that one seaisne might serve for all : and the said charter, bearing, in the *reddendo*, not only *firmas burgales*, but likewise a special feu-duty, it necessarily follows that the feu-lands remained distinct in their own nature from the tenements and lands which hold *in libero burgagio* ; and, therefore, the pursuer's feus being granted for a special feu-duty *pro omni alio onere*, in law they are presumed for all other burdens payable to the town as superior : and the condition and qualification of the charter of confirmation alleged upon, being inserted in the town's charter only, cannot militate against the feuars, who were *in bona fide* to acquire their feus for payment of a feu-duty *pro omni alio onere*, whereby they were secured in law from all other burdens due to the superior but the payment of the feu-duty only. And, as to that pretence, that the feus are granted upon express condition that they should be burgesses and actual residenters,—the same is of no weight ; seeing that was done only to prevent that clanned persons, and gentlemen, who were neighbours and of great power, should not, by conquest or succession, acquire the right of the said feus.—It was REPLIED, to the *third*, That the pursuers were not obliged to know which way their lands did first belong to the burgh, whether by conquest or mortification ; but, as was lately decided in the case of John Boswall against the Town of Kirkaldie, and as is observed by the feuars who hold of the town of Edinburgh, and several other burgesses, they are never stented with the burgesses to contribute for burdens imposed for the private use of the burgh : neither can the use of payment of private stent be alleged, which being inconsiderable, and never complained of, cannot infer a perpetual servitude upon them, when their exactions are now become exorbitant, and so great that they exceed the full rent of the lands.—To the *fourth*, That the decret against Collodin was upon consent ; and was *res inter alios acta*, as to the rest of the pursuers besides Collodin, who were neither called nor compeared in that process.

The Lords did sustain the defences, and assoilyied from the declarator, the town proving their constant possession of stenting the feuars past memory, and assigned a day to prove ; as likewise to the pursuers to prove their freedoms and interruptions ;—being moved especially upon these considerations, that the forest of Dracas did of old belong to the town as a part of their first erection, being then the King's property, and was never conquest by them from any subject : and that the lands in question were first given out in feu for no just price or sums of money paid by their vassals, but were given to them as burgesses and actual residenters, and accordingly had been in constant use to be taxed by the town's tax-masters ; neither were they ever taxed with other heritors of the shire for impositions laid on by King or Parliament ; and that, notwithstanding the feuars, or their singular successors, did enter by charters granted by the magistrates as superiors, to be holden of them, and not as heritors of tenements, who are entered by the bailie, *ratione officii*, to hold of the King *in libero burgagio*.

Page 294.

---

1672. December 20. GEORGE LOGAN of BURNCastle against MR WILLIAM KINTORE, Advocate.

IN an action, pursued at George Logan's instance, against Mr William, for

payment of 2000 merks, it was ALLEGED for the defender, That he ought to have compensation for the like sum, in so far as he had right to a bond, where in the pursuer's goodsire was cautioner; for instructing whereof, he produced a decret of registration, obtained before the Sheriff of Edinburgh.

It was REPLIED, That the decret being given against the principal, who was only called in that process, it cannot verify the debt against the pursuer, as representing his goodsire, who was not called, unless the principal bond were produced; seeing, as to the alleged cautioner, it was *res inter alios acta*; and the decret being but the assertion of the clerk, cannot verify a debt more than an extract of a registrate bond after the death of the granter, or of a transumpt to make faith against a party not cited to compear.

It was DUPLIED, The decret of registration of a bond, whereof the principal was given in to be the warrant of the decret, must be sufficient to verify the debt against the cautioner, unless there were an improbation of the principal bond depending.

The Lords did repel the defence of compensation, founded as said is; and found, That, unless the cautioner or his representatives had been called in the action of registration, as well as the heirs of the principal, the decret of registration could be no ground of a pursuit against them; especially seeing there had never been any action intended against the cautioner or his representatives for the space of fifty years.

Page 296.

---

1673. January 2. DAVID HAY against MR JOHN BELSHES.

IN an exhibition at the said David Hay's instance, as apparent heir to Sir Alexander Belshes of Tofts, for inspection of the said writs *ad deliberandum*,—it was ALLEGED for the defender, That he had right to the said lands by adjudication, which had proceeded upon the renunciation of the pursuer's mother, who was the next apparent heir, whereof the legal was long since expired; so that his right, being a legal diligence, he was not obliged to exhibit the same; unless the pursuer would serve himself heir, and thereby be liable to the debt for which diligence was done.

The Lords sustained the defence, and found, That creditors, such as comprisers and adjudgers, who had acquired real rights by legal diligence, were not obliged to exhibit the same to the apparent heir of the debtor.

Thereafter it was ALLEGED, by way of reply for the pursuer, That he offered to prove, by the defender's own oath, that the debt which was the ground of the adjudication was satisfied and discharged, and so could be no ground of the defence.

It was ANSWERED, That the allegiance of payment could not be proponed by an apparent heir in an exhibition *ad deliberandum*, against a singular successor; but the pursuer ought to be served heir, and pursue a declarator of reduction of the adjudication upon that ground.

The Lords, considering that exhibitions *ad deliberandum* were most favourable, and it being referred to the defender's oath that there was a discharge of the debt for which the land was adjudged, they did sustain the pursuit, in re-