

sue for the sum here in Scotland, the debtor had a good defence in alleging that the bond must be regulated by the law of France; that though he was major the time he granted it by our law, yet he was minor by the French law, (which following the footsteps of the civil law, holds a man for minor till he pass twenty-five;) and therefore he had revoked the same: would not all judge this absurd? and yet it is all one with what the defender alleges, only they left the defender's other creditors free to pursue Jamart, upon his return, according to their police in Bordeaux, and to evict their shares from him, conform to their law there; of which they could take no notice, the defender being a Scotsman, the subject of the debate being here also, and the same being pursued before a Scots judicatory.

Then the defender pressed, that Jamart might at least find caution, that what he should obtain of him here shall be furthcoming to all having interest, as shall be decerned by the consul and jurats of Bordeaux.

This was repelled, because the putting him to find such a caution were alike as to deny him justice, seeing none would bind for him, a stranger, in such a considerable sum. *2do*, He had land and vineyards there, so that none could doubt his responsality. *Possessores immobilium non tenentur satisdare; l. 15 D. Qui satisdare cogantur.* The Lords refused to put him to find caution.

*Advocates' MS. No. 358, folio 146.*

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1672. *July 5.* The EARL of CALENDAR *against* The TOWN of STIRLING.

THE Earl of Calendar, as heritable Sheriff of Stirlingshire, pursues the Town of Stirling for making payment to him of those customs, commonly called the Sheriff-gloves, as also of a stag every day of the fair, conform to his possession, at least the use and wont of his authors, the Earls of Mar. ALLEGED,—That no right was produced to prove the Earl was Sheriff, or had right to the particulars acclaimed. ANSWERED, They had produced his infetment of the Sheriffship, which, though it was general and bore not the particulars he sought, yet he offered him to prove those were immemorial casualties of that office.

ALLEGED,—His infetment is null, proceeding upon a gift or signature of his Majesty's, the time of his captivity in the Isle of Wight, all which are since revoked and declared void. ANSWERED,—Whatever defect he had that way, the same is purged, being ratified in Parliament in 1662. REPLIED, *Quod non est, id nequit ratificari.*

Farther ALLEGED,—That Stirling is sheriff within itself, and so never owned the sheriff of the shire. ANSWERED, The two sheriffships are compatible; the sheriff of the shire is the far older of the two, and was in possession of the emoluments accruing to his office, and now acclaimed, before Stirling were made sheriffs within themselves: that the gift given to the town was *salvo jure antiquiore.*

ALLEGED,—That these thirty years bypast, the sheriff of the shire has used no deeds of possession of what he now seeks; that the town all that time has been free and in possession of their own privilege of sheriffship; and, therefore, the action being possessory, the defenders are to be maintained in their possession

and must have the benefit of a possessory judgment. ANSWERED, There is no immunity prescribed, except they say forty years free.

It was likewise ALLEGED,—That the acts of Parliament discharge all sheriffs from oppressing the lieges in fairs; viz. acts 60 and 61 *in anno* 1456, act 33 in 1469, with many others. Vide act 277, post medium, in 1597; act 125, P. 1581. *Item*, that it is *res judicata* already betwixt the Town and this pursuer's authors, in so far as they having been pursued by the Earl of Mar for thir very customs, they were after debate assoilyied therefrom. ANSWERED, That *res judicata* being *exceptio impeditiva litis ingressus*, and so in effect a dilator; the same must be instantly verified by production of the said sentence *absolvitor*, else no respect ought to be had thereto. Vide *Dury*, 10th July, 1623, *Cronnar of Arran* against *Laird of Skelmurly*.

*Advocates' MS. No. 359, folio 147.*

1672. June 15, and July 6.

June 15.—A DONATOR to the ward and marriage of a subvassal pursuing for the ward of the lands of —, who had obtained them in feu from the subvassal, who held the whole ward of a subject superior. Against which pursuit it was ALLEGED, That his lands did not ward, because having obtained a lawful feu thereof, conform to the 72d act of Parliament in 1457, all that could belong to the donatar was allenary his feu duty which he owes to his superior; the donatar being now come in his place. Vide act 90 in 1503; act 116 in 1640.

To this it was REPLIED,—That this feu being set since the 12th act of Parliament in 1606, the solemnities prescribed by that act ought to have been observed. Vide *infra*, No. 360, [6th July, 1672.]

DUPLIED,—His feu is set conform to the tenor of the said act, for he has obtained the confirmation and consent of his superior's superior; and, therefore, his mediate superior, nor any deriving right from him, can never quarrel the feu, nor claim more by their immediate vassals' warding than the feu-duty contained in his charter, and which charter the superior has confirmed.

TRIPLIED,—*Esto*, The superior has confirmed the said feu charter, that can import no renunciation or discharge of the ward of these lands, when the superior thereof falls in ward; but all that the superior designs to quit thereby is only the benefit and casualty of recognition. And that Hope tells this to have been the Lords' opinion, where the king confirms a feu set by his ward vassal to a subvassal: that confirmation saves from recognition, but not from ward; *ergo idem dicendum*, where another superior from the king consents to a feu set by a vassal holding ward of him. See Hope, Tit. of Ward and Releiff, in *fine*; *Lord Cathcart* against *his vassals*, folio 93.

To which it was QUADRUPLIED,—That the case of the king and of other superiors differed, which is clear from the said act in 1606, though now both their rights are made equal and levelled by the 16th act of Parliament in 1633. That a subject superior, by receiving and infesting his vassal, quits all preceding feuduties, if any be owing. *Ergo*, By confirming his subvassal's feu charters, he