

The Lords did repel the defences; notwithstanding that the Acts of Parliament bear that the creditor, *quoad* the debt whereof he is frustrated, should be first satisfied before the fisk can have any right; but statutes nothing for payment of the debt by the deforcer; as to which the debtor himself is still liable. But, in respect of the foresaid practick, and that if the libel had been expressly founded upon damage and interest, undoubtedly it would have been sustained upon that ground; and, therefore, they found the defender liable for the debt: seeing, otherwise, the creditor might be altogether frustrated, the debtor being freed from the caption, and so in a capacity to go away; and the deforcer might be a man of no fortune, and his moveables inconsiderable.

Page 287.

1672. December 13. The LADY MILNTOUN *against* The LAIRD of MILNTOUN.

IN the reprobator, pursued at the Laird of Milntoun's instance against the Lady, for corrupting of the witnesses who had deponed in a process of divorcement, wherein she had obtained decret before the commissary against her husband;—it was craved for the lady, by a bill, That she might have diligence for citing of witnesses to prove that the Laird himself had corrupted those witnesses; which, being proven, will incapacitate him to pursue this action of reprobator against her.

It was ANSWERED, That the desire of the petition could not be granted; because the Lady, having obtained decret upon the depositions of the same witnesses, unless she would renounce the benefit thereof, she could not pursue a reprobator before the Lords against the Laird of Milntoun; for they are only pursued before the Lords *ad civilem effectum*, to take away decreets which are only founded upon the depositions of these witnesses.

The Lords refused to grant the desire of the bill; and found, That the Lady, craving the same only *ad vindictam*, and, notwithstanding, pursuing her interest upon the said decret, which she would not renounce, could only pursue the reprobator before the justice.

Page 289.

1672. December 17. The EARL of MARSHALL and LORD ARBUTHNOT *against* BARCLAY of JOHNSTOUN.

ARBUTHNOT, as assignee, by the Earl of Marshall, in and to a bond of 6500 merks, granted to the deceased Earl of Marshall by Barclay, bearing, that it was for a part of the price of the lands of Cletton, disponed in feu,—having charged Barclay for payment, he did suspend upon this reason, That, by a posterior contract of wadset of these same lands, wherein the first right of feu was resigned,—it was DECLARED, That the whole sums of money due as the price of the said lands were satisfied and paid; and, therefore, the bond being granted for that same cause, must of necessity be interpreted to be paid, and should have been delivered back to the suspender: which likewise may be evinced, in so far as the Earl did pay the 500 merks more than the 6000 contained in the bond.

It was ANSWERED, That it being ordinary, when lands were disposed, to grant the receipt of the price, and bonds are granted for the same, any declaration by way of narrative, in a subsequent contract, will not import payment of the bond, unless it had been retired; it being usual, upon receipt of bonds as the price of lands, to grant discharge of the price, and receipt of the money in dispositions.

The Lords did find, That the bond not being retired, the narrative of the wadset, bearing payment of the sums, could not prove payment of the bond, unless the suspender would prove otherwise, that really he paid the money, or did otherwise satisfy the bond; especially considering that the suspender was known to be a very exact man, and would not have omitted to have retired the bond.

Page 290.

1672. December 19. The LAIRDS of COLLODIN and INCHES *against* The TOWN of INVERNESS.

IN a declarator of freedom from private stents and taxations, imposed for the private use of the town of Inverness, pursued at the instance of Collodin, Inches, and some others, who held their several lands feu of the town, for payment of a feu-duty *pro omni alio onere*, so that they could be liable to no impositions but such as were ordained by public authority, and to which other heritors were liable, who held their lands feu of the King, or any other superior:

It was ALLEGED for the Town, That no such declarator could be sustained: 1st, Because the pursuers' feu-charters were of a different nature from ordinary feus, who held of other superiors, in so far as they were granted to the several feuars upon express condition that they should be actual burgesses and residents within the town, secluding their wives and heirs-female; which qualifications did necessarily imply that they should be liable to all impositions for the private use of the town, as well as all other burgesses. 2d. The said feu-lands, by a charter of confirmation *in anno* 1591, were united and incorporated with the burgh, to be holden of the King, *reddendo* a feu-duty *et firmas burgales*; and so were liable to contribute as a part of the burgh, as all other tenants within burgh: likeas, in the town of Aberdeen and several others, the feuars of their salmon-fishings have been constantly in use to be stented with the rest of the burgesses. 3d. These two lands, being part of the Forrestry of Dracas, which was mortified by the King to the town at their first erection, to be disposed to their burgesses, only as said is, and were accordingly set in feu by the town, not for any just price paid by the feuars,—they are not in the condition of feus acquired by burghs after their erection, which remain to be parts of the shire, and liable with them to the public burdens; but, on the contrary, the pursuers have been constantly in use to be stented with the inhabitants of the burgh, not only for taxations imposed by public authority, but for other necessary stents for the use of the burgh. 4th. This case is *res hactenus judicata*, in so far as all the grounds of the declarator being alleged in a process at Collodin's instance, there is decret given against him, finding him liable as the rest of the burgesses.

It was REPLIED, to the *first* and *second*, That the charter of confirmation, whereupon the defence was founded, was opposed, which bears only a union of the feu-lands with the burgh of Inverness, as is usual in all feu-lands acquir.