

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.

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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.

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*.

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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