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*, 10*th 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 allenarly 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, [6*th 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 infefting his vassal, quits all preceding feu-duties, if any be owing. *Ergo*, By confirming his subvassal's feu charters, he

reserves nothing when the lands shall return to him through reason of ward, but allenarly the feu-duty. *Hoc eget decisione imperatoria*, and would put the lieges to much certainty, who, generally, when they get pieces of ward lands feued to them by the vassals holding them ward, and obtain the same confirmed by their author's superior, they think themselves fully secured against all dangers and inconvenients whatsoever; whereas it would be of lamentable consequence, if such deeds were found not to free from ward, but allenarly from recognition.

See the 58th act of Parliament in 1661; Craig, *de feudis, pagina* 110, *lib.* 1, *diegesi ult.* See Dury, *9th March*, 1639, *Lord Almond*. *Vide infra, No.* 344, [*22d June*, 1672.]

It were a thing of infinite advantage to this kingdom if all ward holdings were utterly suppressed; and truly, in England, upon the grant of the chimly money, the king has remitted all the casualties of ward to his vassals there; and it would be more in the superior's way to have a constant yearly retoured duty paid to them, whether king or subject, according to their respective rights, furth of all the land in Scotland, than to wait upon the uncertain casualties of ward, liferent escheats, and the like: it would take away much confusion, abridge our laws, cut off a thousand intricate and fraudulent contrivances introduced by the feudal customs, and reduce us to that ease that we should not need the half of the evidents we now have: and though it would induce a seemingly horrid innovation on the face of our law at first, yet it would make it infinitely more amiable, more perspicuous, and more plain, after it had become once customary to us. See Craig, *ubi supra*, anent the king's annexed patrimony.

Advocates' MS. No. 339, *folio* 134.

1672. *July* 6.—In the debate marked *supra* at No. 339; if a confirmation of ward lands given forth in feu, salved from ward, or if it was only a discharge from recognition; the Lords found such a confirmation to liberate from all wards and other casualties whatsoever that follow the nature of ward-holdings.

I hear some very good lawyers doubting whether those lands which held formerly ward of his Majesty, and now are changed to taxed ward or feu, by virtue of the commission and power given by the act of Parliament in 1661, of which there are a great number, are well secured in their change; and if the said alteration may not be questioned hereafter, or annulled and revoked, upon this ground in law, that some acts of Parliament seem to insinuate, that ward holdings are a part of the patrimony annexed to the crown, and therefore cannot be changed in diminution of the king's rental, without a lawful dissolution had preceded in Parliament, and done upon special knowledge that the same is for his Majesty's seen profit and utility.

They say this was alleged in Cranburne's recognition: but President Gilmoor, in regard of the change of his own lands of Craigmillar, first to blench and then to feu, was hugely displeased with it; and alleged those ward-holdings spoke of in the act of Parliament as annexed to the crown, behoved to be understood only of certain lands formerly holden ward of his Majesty, and the property whereof was returned to him by reason of forefaulture or otherways, and which were declared to be of the annexed property. Yet I think the superiority

of ward holdings as they stand in his majesty's person, they are a part of his property, and may be meant in that act.

Advocates' MS. No. 360, *folio* 147.

1672. *July.* JACK *against* JACK.

IN an action, Jack against Jack, a father having given a moderate bond of provision to his three younger children, the same was quarrelled upon this ground, that it was subscribed by two notaries, only before three witnesses.

The Lords found the bond null. And when the parties were content to restrict it to L.100, for which one notary and two witnesses were sufficient; the Lords refused the same, because they found it wholly null, *et quod contra legem seu formam juris fit ipso jure nullum est.*

This seems contrary to their very frequent practice, by which they ever allowed restriction to the sum of L.100, conform to that axiom of the law, *utile per inutile non vitiatur.* See Dury, 19 *December* 1629, *Elliot* against *Morton*, where the Lords resolve in all time coming to permit the parties to retrench their bonds. *Vide infra, No.* 398, [*Deans, June* 1673.] This decision agrees with the French arreists; *Mornacius in observationibus ad l.* 29 *D. de legibus, Quia salvis legis verbis ejus mentem circumvenire non licet.* See Mornacius also *ad l.* 38 *D. de pactis.* *Advocates' MS. No.* 362, *folio* 148.

1672. *July.* ESSINTULY *against* ——.

ABOUT this time, in a reduction raised by Essintuly against ——, the Lords found, that a man having granted bond, and paid a part of the sum, if the creditor thereafter assign the whole bond to a third party, who charges for the whole, and gets out caption and takes the debtor, who, though he had paid a good part of the sum to the cedent, yet through necessity, and to relieve himself out of the messenger's hands, gives a bond of corroboration for the whole, as well that which he had paid, as that which was yet resting. The Lords would not reduce the said bond of corroboration, upon this reason, that though he had corroborated the whole, yet truly there was but such a sum resting, and the remainder was paid to the cedent, as his discharges thereof confess: which they would not receive now, because, by his giving the bond he had renounced any defence or allegeance he could found upon these discharges; that he had voluntarily prejudged himself; that the force and fear he was under when he gave the bond, was legal and just, and so could never annul the bond. And this they found, notwithstanding they alleged, that a bond of corroboration was given in farther security, and not to innovate the first bond; and, therefore, whatever may be objected against the first, may also be objected against the bond of corroboration; now the discharges would have undoubtedly defalked the first