

## No 5.

Found in conformity with Rollo against Murray No 1. p. 4185.

1665. July 19. MR JAMES WINERHAM *against* LADY IDINGTON.

MR JAMES WINERHAM pursues the Lady Idington personally, for feu-duties out of certain lands liferented by her. It was *answered, non relevat*, for any years before the Lady's possession, because feu-duties may be pursued, either really, by pointing of the ground, or personally, against the intromitters with their profits; and because the feu-duties are as the yearly rent; yet that cannot be extended further, than during the years the possessors intromitted. The pursuer *answered*, that the whole profits being liable for the whole feu-duties, whether of that, or preceding years, the Lady was liable, not only for the years of her possession, but for bygones.

THE LORDS repelled the allegiance, and found the Lady liable personally, only for the years of her possession.

*Fol. Dic. v. 1. p. 296. Stair, v. 1. p. 299.*

\* \* \* Newbyth reports the same case :

MR JAMES WINERHAM, as one of the heirs-portioners of Mr William Kelly, pursues the Lady Idington for payment of the feu-duties of that portion of land of Eastbarns, commonly called Switherdale; and concludes payment against her of the feu-duties of the saids lands upon this mids, that she has intromitted, and has been in the possession of the saids lands, and labouring the same with her own plough. It was *alleged*, she could only be liable for payment of the feu-duties for the years wherein she did intromit, and not for preceding years. It was *replied*, that the duties being real, and she being heritor and intromitter with the rents, she ought to be liable for payment of the feu-duties, albeit of years preceding her intromission, especially since she has intromitted with much more than will satisfy the feu-duty. THE LORDS found she was only liable personally for the years of her own intromission; and the pursuer might point the ground for preceding years.

*Newbyth, MS. p. 37.*

1696. February 25.

TOWN-TREASURER of EDINBURGH *against* The Co-HEIRS of SHEINS, &c.

## No 6.

A feu-duty was payable in victual. Found that where the superior dwelt without the barony, the vassal was

THE Town-treasurer of Edinburgh pursues the Co-heirs of Sheins, and sundry others, their vassals, in the Burrow-muir, for delivery of their victual (*ipsa corpora*) in time coming, and paying the highest prices for bygones, conform to the *reddendos* of their charters. *Alleged, imo*, They have been in use, past memory of man, never to deliver the bolls themselves, but allenarly the fiars,

and these always 20 shillings, or a merk below the current prices: *2do*, If they were to pay the bolls, they cannot be obliged to do it in barley, because, though the ground now produces it, through their industry and expence of mucking, yet, at the time of the subfeudation, about 100 years ago, there was no barley then in Scotland; and the words of their charter are *tot modios hordei*; whereas barley is usually expressed by the words of *hordeum optimum*; and the feuers of Musselburgh, &c. pay no other. *Answered*, Whatever has been the Town's lenity, yet that cannot prejudice a community, and superiors may exact their feu-duties *in specie*, and no prescription can run against that; and it is ridiculous to think vassals should be allowed to offer other victual, or worse than their ground produces. THE LORDS found, though the Town should not be rigorous to their feuers, yet in law they may require the bolls themselves; and, in case of not delivery, they might exact the highest fiars *in modum pœnæ*. And the question arising, who should carry the victual? The feuers contending they were only obliged to deliver it on the barn-floor; the LORDS found where the superior dwelt within the barony, the vassal was not bound to go and seek him *extra curtem domini* (as the feudal law calls it,) but if he lived *infra baroniam* (as the Magistrates of Edinburgh did) then the feuer was bound to bring it to the superior; and likewise found, that these feus being perpetual locations, and *emphytheuses* for meliorating and improving of the ground, the superior had right to such grain as by the vassal's industry grew thereon; and found the public burdens and cess being imposed *intuitu* of the feu-duty, as well as the vassal's part of the lands, these burdens ought to be borne proportionally by the superior and vassal effecting to their respective interests, the feuer being only like a *colonus partiarius* in the case. But in regard it was not liquid, the LORDS did not receive it here, but reserved to the vassals their action for constituting and dividing the same betwixt their superior and them. See PUBLIC BURDEN.—TACK.

*Fol. Dic. v. 1. p. 296. Fountainball, v. 1. p. 715.*

1712. January 22. HAMILTON against LORD BURLEIGH.

MARGARET HAMILTON and Mr David Orme her husband, having right from the late Marquis of Athol to some feu-duties due out of the Lordship of Falkland, pursue my Lord Burleigh, heritor of Freuchy and Newton, for payment of the feu-duties of these lands *personali actione* for many years bygone. *Alleged*, That for all the years since I bought these lands I am most willing to pay at the bar; but, for years preceding my purchase, I can never be personally liable; neither is the superior at any loss, for he has two remedies; he can either summarily poind the ground for his bygones, it being *debitum fundi* affecting the land, or he may adjudge, which will prefer him to all other creditors. I suppose, one acquires an infestment of annualrent; he can poind for his by-

No 6.  
not bound to seek him *extra curtem domini*; but if he lived within the barony, the feuer was bound to bring it to him.

No 7.  
Found in conformity with Rollo against Murray, No 1. p. 4185.