

ed to the King, each of them, to have conveniency and accommodation for men and horses every day, it having been the King's palace; for which causes he gave them all the privileges and immunities of a burgh royal. *Vide infra, No. 331.*

*Advocates' MS. No. 132, folio 90.*

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Anent APPRENTICES.

WHERE a prentice was bound with a master by the space of five years, more or fewer, and either the master or the prentice dies before the expiring of the prenticeship, it has been questioned whether the whole prentice fee can be exacted yea or no; and the Lords have sundry times found, it being a contract *bonæ fidei, et bonum et æquum* claiming much part therein, the prentice fee should be divided *pro rata temporis* that the prenticeship subsisted, and no longer. *Vide infra, No. 256. Archibald Hyslop. Vide Paulum, in l. 4, p. 5. de Statu liberis. Vandum libro 1. varia: Quæstionum. Infra, July 1677. No. 628.*

*Advocates' MS. No. 133, folio 90.*

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1671. *February 21.*

Anent APPRENTICE FEE.

THIS is an action at a Sutor's instance in the Potterrow, *against* ———, who was cautioner for payment of the prentice fee in the indenture, to pay it. Against which it was ALLEGED, That he could not be heard to seek this prentice fee, because it was offered to be proven, (and a term behoved to be assigned for proving it, though he was in suspension, because it was *facti*,) that the boy staid not half a year with him, and that through his default, who did beat him till he was both blea and bloody, and to the effusion of his blood; and his cruelty was so great, that the boy durst stay no longer with him: and albeit moderate chastisement be permitted to a master, *attamen inhumanum et nullatenus Christianum est sævire in servos, l. 5. p. ult. et l. 6. D. ad legem Aquiliam.* To which it was REPLIED, That in fortification of his charge, he offered him to prove that he used him no otherways than the other sutors in the neighbourhood use their prentices.

My Lord Advocate, before answer to the relevancy, appointed a conjunct probation to both.

*Act. Charg. Beaton.*

*Alt. Harper.*

*Vide Feb. 18, 1680.*

*Advocates' MS. No. 134, folio 90.*

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1671. *February 21.*

————— *against* CORLEY, &c.

ONE having an infestment of annualrent out of two tenements of land lying in the Canongate; and pursuing a poinding of the ground against Couley, and some other possessors.

It was ALLEGED, *1mo*, That he behoved to restrict his annualrent to 6 for the 100. This they were content to do. *2do*, The resignation whereon they were infest was null, because made in the Bailie of the Canongate's hands, whereas it should have been in the Earl of Roxburgh's, who was then superior. The Advocate repelled the allegiance, in respect it has ever been the custom that these resignations have been made in the Bailie's hands; in respect of which he sustained the resignation. *3tio*, ALLEGED, The decret of poinding must only be for the one half of the annualrent, because the pursuer, since his infestment of annualrent, has acquired the property of one of the two tenements which stood burdened and affected, so that *consolidatione et confusione tollitur obligatio*, and he is become both debtor and creditor as to the half, and he cannot have a servitude in that which is now become his own property, *cum res sua nemini serviat*.

To this it was ANSWERED, That the other tenement stood bound to him for his whole annualrent, since his right was an infestment of annualrent out of both of these tenements, or any part thereof, so that it was altogether in his option to take himself to the one or the other for his annualrent as he pleased, neither could he be restricted; and it is like to more *correi debendi* bound to a creditor conjunctly and severally, who may distress any of them he pleases.

REPLIED, Albeit he may distress any of them for his annualrent, yet if one of them pay the whole, it is out of all question but the heritor thereof will have relief against the heritor of the other tenement also bound *pro rata*; and so this pursuer will so be both debtor and creditor.

TRIPLIED, That is true where they belong not both to one man; but here there was one common author of both.

My Lord Advocate inclined to find annualrent extinct *pro dimidio*; yet was sparing, and took it to himself in avisandum. *Vide infra, No. 178. [June 22, 1671, Balmerinock.]*

*Advocates' MS. No. 136, folio 90.*

1671. *February 21.* The EARL OF CALLANDER *against* PATRICK HADDEN.

Two comprisers, viz. Earl of Callander and Patrick Hadden, competing for the mails and duties of lands, it was objected by one of them against the other, that his comprising was null, in so far as it proceeded upon a gift of the ward of a marriage given, which marriage and ward could not fall, in respect the laird of Glennagies, by whose death the ward fell, was slain in the troubles at Dunbar in 1650; to whose heirs, by act of Parliament, their wards and marriages were gifted, viz. *Act 30, Parl. 1640.* To this it was ANSWERED, that *1mo*, That act was introduced only in favours of the heir and relict of the party slain; but so it was, the proposer of it here was neither heir nor party, and so he had not interest to propone it. *2do*, It was but a temporary act, to last during the time of the then troubles; but so it was, they were all after composed, and an act of oblivion and pacification past in 1641, and so it expired. *3tio*, It is expressly rescinded. REPLIED, any thing that is