

SECT. XXI.

Adjudication of Superiorities.—A Superior not liable to Parochial Burdens.

1745. June 29.

CHALMER *against* POTTER.

The estate of Gadgirth having, since the year 1693, been in the hands of creditors, who had led adjudications, but whereof the legals were all open, Captain John Chalmer, the lineal heir of the family, finding it not proper to make up a title as heir, did, in implement of certain articles of agreement, entered into upon the 12th of April, 1695, by some of the most considerable creditors, who were friends of the family, whereof Sir David Cunningham of Milncraig was one, acquire right from Sir James Cunningham, son and heir to Sir David, to an old adjudication that had been led in 1693 against the then John Chalmer of Gadgirth, and whereon Sir David had obtained a charter and infeftment in the same year; and upon this disposition from Sir James Cunningham, he expedite a charter of resignation under the great seal, whereon he was infeft in February 1743.

Upon the title of this charter and infeftment, he pursued reduction and improbation, declarator of non-entry, and mails and duties, against John Potter, portioner of Culraith, a small tenement held blench of Gadgirth, which had lain in non-entry for upwards of 60 years; and the defender having produced his predecessor's rights, which excluded the reduction, the pursuer insisted in his declarator of non-entry, and claimed the retoured duties for forty years preceding the citation, and the full duties from the citation.

But the Lords found, "That whereas the pursuer did not claim the superiority as heir to his predecessors, but as singular successor, he was only entitled to the retoured duties from the date of his charter."

As within the legal, an adjudger is not entitled to receive a vassal, whether the legal be not expired in point of time, or kept open by transactions, as the legal of this adjudication was understood to be, and so to remain till, by the pursuer's purchase from Sir James Cunningham, it became the title to the estate in the person of him the legal heir, it could entitle him to the retoured duties only from the date of his own right.

This truly was the reasoning on which the Lords, at advising, proceeded; though, as the interlocutor is expressed, it comprehends the case of every singular successor, which they by no means intended, as what would not have been agreeable to the principles of the feudal law.

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An adjudger of the superiority from what time entitled to the non-entry duties?

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For, had the legal of this adjudication been expired in the person of Sir David Cunningham, it ought not to be doubted, but that as Sir David, so his assignee Captain Chalmer, was entitled to the retoured duties during the non-entry, as Captain Chalmer would have been had he entered heir. Mean time, Captain Chalmer taking advantage of the terms in which the interlocutor was expressed, was advised to appeal; and the House of Peers affirmed the decree, willing possibly to restrict these feudal casualities which they are not acquainted with, from considerations that might appear to them equitable.

Fol. Dic. v. 4. p. 316. Kilkerran, No. 6. p. 530.

* * D. Falconer's report of this case is No. 41. p. 9330. *voce* NON-ENTRY.

1794. February 20.

JOHN MURRAY *against* JAMES SCOTT.

No. 94.

The superior is not obliged to relieve the vassal from any share of parochial burdens.

In 1696, two-thirds of the lands of Nether Balcairn, with the teinds, and a corresponding part of the seat in the parish church, were feued out to Andrew Mitchell, who became bound to pay cess, and all "public burdens forth of and for the forenamit two part lands, according to the valued rent of fifty-five pound eleven shillings and twopence, as the proportion of the hail valued rent of ane hundredth fifty-three pound six shillings money foresaid, (Scots), whereto the hail lands of Nether Balcairn is valued, togidder efferand to the forenamed two part lands."

In 1792, John Murray, who had acquired the superiority of these lands, brought an action against James Scott, then in right of Andrew Mitchell, for by-gone feu-duties.

The defender stated, as a ground of compensation, a part of the money he had paid for rebuilding the parish church; contending, that not only was the expense of building and repairing kirks and manses in every case a joint burden upon superior and vassal, 1663, C. 21. but that, in this case, the feu-contract fixed the proportions payable by each; that the expense of building and-repairing kirk and manse came under the description of a public burden; Stair, B. 2. Tit. 6. § 20. and that all doubt on the subject was removed by the understanding of the parties, who had, ever since the date of the contract, contributed jointly to parochial burdens. See Dundas against Nicholson, No. 22. p. 8511. *voce* MANSE; 23d January, 1773, Bruce Carstairs against Greig and others, No. 66. p. 2333, *voce* CLAUSE; 1791, Bayne against Watson, (not reported; see APPENDIX.)

The Sheriff repelled the defence; and an advocacion having been brought by the defender, the Lord Ordinary decerned in terms of the Sheriff's interlocutor.

At advising a reclaiming petition, it was

Observed on the Bench: Unless there is a special agreement to that purpose, the superior is not liable for parochial burdens. He has no right to a seat in the church, and therefore is not obliged to support it.