

given for encouraging export. ANSWERED,—I must have the benefit of the drawback; for, if there were a duty or imposition laid on them, (as once there was at exporting,) I, as proprietor, behoved to pay it; even so here, *a pari, qui sentit incommodum debet et habere commodum.*

The Lords found the drawback belonged to the vassal. Some proposed that it might be left to the superior's option, yearly, either to accept a barrel cured with Scots salt, without paying the drawback, or with foreign salt, deducing the drawback. But it was thought this alternative would be the seed of a yearly plea and contest; and therefore it was laid aside. The vassal's disadvantage was, that he had feued that land, mainly in contemplation of the fishing salmon at the mouth of the Tay and near Dundee; and it had much failed and decayed several years bygone. *Vol. II. Page 661.*

---

1711. July 19. HELEONORA NICOLSON, Lady Greenock, *against* SIR JOHN SHAW of GREENOCK, her Son.

AN appeal was given in by Lady Greenock against Sir John Shaw, her son, against the Lords' interlocutor finding the contract passed betwixt her husband and her null and dissolved *ob causam datam causa non secuta*; because, though it bear she had fulfilled her part by giving a disposition of the lands of Carnock to her son, yet it was now come *in non causam*, being lying beside her cancelled, and that law presumed she had destroyed it, being in her custody, and bearing a clause dispensing with the not delivery; and never being ratified by her, unless she instructed another way. And repelled her offer of making it up, and giving a new disposition to take off her son's damage. *Vol. II. Page 663.*

[See Reports of this Case, by Forbes and Fountainhall, Dictionary, pages 8563 and 9166.]

---

1711. July 19. TOWN of ABERDEEN *against* DR MIDDLETON and OTHERS, Masters of the College of Aberdeen.

THE TOWN of Aberdeen having purchased a part of the lands of Panton of Hilton at a roup, which holds of the College, they charge Doctor Middleton and other masters, to receive them, and offer a year's rent. They SUSPEND on this reason,—That they being a community, which never dies, if they entered them they should lose the casualties of superiority; such as non-entry, liferent escheat, duplication of the feu-duties which arise by the death, delinquency, or neglect of other private vassals; which is such a prejudice to superiors, that Stair, *tit. Infestments of Property, sec. 41*, from Craig, thinks a superior is not bound to receive a community for his vassal; and proposes a remedy,—that the corporation should name a trustee, by whose death or delinquency the casualties of the superiority should open; (and which Basnage, in his learned *Commentaries on the Customs of Normandy*, calls *un homme vivant et mourant*; and Craig, *lib.*

1, *dieg. 2, homo vivens et moriens*;) and that his trust be engrossed, both in the charter and seisine, for the corporation's better security.

ANSWERED,—That towns are as capable to purchase and acquire lands as any other of the lieges; and, if so, then law cannot be defective in their entry. And it were a great discouragement to mortifications, if they were subjected to the hazard of non-entries, escheat, and the like; for that might frustrate and disappoint the pious design of mortifiers, and carry away the rents to a superior; which was never intended. It is true, superiors are not bound to receive vassals upon resignation; but, if the party haver of the disposition adjudged the lands, he, by the 18th Act 1669, can force the superior to receive him, on the payment of a year's rent. And, by the feudal law, all the privilege he had was, in his option, to take the land to himself, he paying the debts, which was called the *retractus dominicus*. And the loss of some casualties is not to be considered; for the feu-duty or other reddendo of the charter is the only essential part. The other casualties are but accidental, and seldom happen. And Stair, *ubi supra*, acknowledges the case has never been decided in favour of superiors. And it were a great hardship to burghs or other communities to do it; for, put the case, the Society for Propagating Christian Knowledge, lately erected in Scotland, should, with their stock, buy land, how unreasonable were it to refuse them, because they cannot die? And to expose them to non-entries, liferent escheats, &c. were to dwindle away so noble and generous a mortification to nothing, and to invert and destroy the pious donation. It is true, if a foreigner or alien, without letters of naturalization, should buy lands in Scotland, he behoved to do it by an interposed trustee; but this is not the royal boroughs' case, who are subjects and natives. If the lands had held of the crown, the Prince, as common father to all his people, would make no scruple in receiving them; and why should the superiors be more uncharitable?

REPLIED,—That however the Act of Parliament 1669 appoints superiors to receive adjudgers, yet one who buys at a roup of a bankrupt is not an adjudger within the compass of that statute; seeing roups by adjudication came in long after, by the Act 1690, and so could not be in the meaning of the Act 1669. Some said the College was too invidious; for, if they were buying lands themselves, this same objection might be obtruded,—You are immortal; you are an incorporation; we will lose our casualties by admitting you for our vassal; and therefore ye must name a trustee, by whose going to the horn both your table and bursars may come to starve. And though *nemini invito jus suum est auferendum*, yet feudal contracts are much altered from what they were originally, and now more reduced to the way of commerce and trade.

Though some of the Lords inclined to find the letters orderly proceeded against the College till they received the Town for their vassal, yet some concerned in superiorities moved a hearing in presence, the case being new, and of great extent in its consequence; and if the Act in favours of creditors-adjudgers will extend to buyers who purchase by roup,—that being a kind of adjudication now introduced by law. Therefore it was ordained to be farther heard.