

his favour, after his death, his son being of the same name, was charged, denounced, and taken with caption for the same debt.

No 13.

THE LORDS upon a bill did find, That the son ought to be free of the said debt; and in regard of the charger's trincating and fraudulent practice, they modified L. 40 to be paid by him, the one half to the party, the other half to the poor's box.

Clerk, Gibson.

Dirleton, No 281. p. 137.

1694. July 38.

FALCONER against WISHART.

No 14.

DAVID FALCONER gave in a petition *contra* William Cleland, mentioned 26th July 1694, No 70. p. 3731. founded on the acts of James III. and V., Queen Mary, and James VI. that malicious pleyers who tyne the cause, should pay the other party damage and expenses; and subsumed, that on an uncontroverted principle anent the nullity of the inhibition, he has put him to upwards of L. 1200 Scots of expenses, &c.—THE LORDS found, seeing there were different interlocutors, and so *probabilis causa litigandi*, there could be no expenses modified; for the lawyers say, that *opinio unius doctoris* is sufficient to liberate from expenses.

Fountainball, v. I. p. 640.

1701. February 23.

ROBERT SMITH against JOHN HAMILTON.

No 15.

ROBERT SMITH chirurgion having pursued John Hamilton in Elgin, for payment of L. 200 he had entrusted him to uplift from one of his debtors; he first denied the trust, and that being made out against him by witnesses and other pregnant adminicles, then he founded on a discharge; and it being referred to his oath, that this debt was neither *actum* nor *tractatum* to be comprehended, he, after much shifting and tergiversing, at last compeared, and deponed that it was communed and included, whereupon he is assoilzied and gains the cause. But Smith gave in a bill, representing how calumnious he had been in all the steps of this process, and had most disingenuously denied the trust, till it was clearly proven against him; and that he had declined all along to depone, by which he had put Robert Smith to vast expenses in adducing witnesses to evince the trust; and therefore craved that he might be condemned in his expenses. THE LORDS thought the case new, for one who had lost the cause to crave expenses of him who had gained it; seeing the rule of law lay just in the contrary, that *victus victori in expensis condemnatur*: Yet the Lords, considering that such cases might fall out, where the party who wins the cause may be most

A person assoilzied, in consequence of his oath, was, notwithstanding, found liable in expenses, on account of improper conduct.