

they shall bring in their client to depone; and, besides, he has already deponed in this cause, in another pursuit before the Bailies of Edinburgh, and denied the libel.

The Lords were displeas'd with that custom of marking persons present, when they are only there by their procurators; and order'd it to be rectified: but, in respect of the circumstances in this cause, they turn'd the decret to a libel, and reponed the defender to his oath. *Vol. II. Page 444.*

1708. *June 25.* SIR JAMES ELPHINSTON *against* LORD SALTON.

IN 1692 Lord Salton signs a bond, blank in the creditor's name, for 1000 merks, wherein Mr John Buchan was principal, and my Lord cautioner, to be a fund of credit for Mr Buchan to raise the money; but he, not having use for it then, kept it beside him till the year 1701; and being debtor to Sir James Elphinston, he gives him this bond in part payment; whereupon Sir James charging my Lord, he suspends, and raises a process of exhibition and delivery of the bond, on this ground, That it lay many years in the debtor Mr Buchan's hand, after the term of payment, not made use of, and so must be reputed *instrumentum apud debitorem repertum*, and consequently *solutum* and extinct; and Mr Buchan, by his letter and declaration, denies that ever he delivered it to Sir James; but when his house was burnt, in the Meal-market, in February 1700, he sent some bundles of his papers to Sir James's chamber, and it seems this has been amongst them: and though this bond is prior to the Act of Parliament in 1696, discharging blank-bonds, yet, its delivery being posterior to that act, it will fall, under the prohibition of that act, to be null.

ANSWERED,—Whatever has been Mr Buchan's part in this cause, Sir James Elphinston's acquisition of it is both honest and fair; and, to convel Mr Buchan's declaration, he produces a fitted account betwixt them, wherein Mr Buchan declares, that he had given him this bond in part payment of his debt; and the Act 1696, discharging blank-bonds, has no retrospect, and so concerns not this case: and the brocard of a writ *apud debitorem* were good, if my Lord could instruct that this bond had been ever out of Mr Buchan's hand, before its delivery to Sir James; for then it could not be kept up to afford a fund of credit oftener than once.

The question was stated,—Repel my Lord Salton's defence, or appoint Sir James to depone on the time and manner of his receiving it, and exhibit, reserving against delivery? And the Lords being equally split, it carried, by the President's vote, that he should depone before answer. *Vol. II. Page 445.*

1708. *June 26.* THE TOWN of EDINBURGH and HAY their Collector *against* RUSSEL, FULTON, and other Merchants.

HAY having charged them to pay a merk upon the ton and pack of all goods

brought from England to Leith, conform to a charter from King Charles the First in 1636, gifting that imposition to the Town for paying their debts :

ALLEGED,—By the articles of the Union, a communication of the trade being introduced, the said taxation falls ; the English goods can pay it no more than Scotch. *2do*, It is against the claim of right, declaring all such gifts, without consent of Parliament, null.

ANSWERED,—All private rights, especially those of the royal burghs, are expressly reserved by the articles of the Union, so that a free trade betwixt the two nations can never take away this right from the Town : and my Lord Godolphin, Lord Treasurer of Great Britain, having, at the desire of the Magistrates of Edinburgh, consulted Sir James Montague, her Majesty's Solicitor-general, on this point, he has given his opinion in writing, under his hand, That the Town of Edinburgh has as much right to it, notwithstanding of the articles of the Union, as the City of London has to their duty of scavage and package, which they still exact from the Scotch ships.

REPLIED,—That Carlisle might have as well continued the exacting their custom upon our black cattle, imported that way to England ; but they, finding it at an end by the Union, applied to the Parliament of Great Britain, and got an equivalent for making up their damages ; and the Town of Edinburgh's gift must vacate the same way, and there is room for applying to get an equivalent in place thereof ; and Montague his opinion is no more than if any of our lawyers should assert it ; neither has the fact been truly stated to him. And the Town's possession these sixty years bygone signifies nothing, for no prescription runs against fundamental laws founded on public utility and the rules of government ; as was found in that famous decision, *January 1681, Jack against the Town of Stirling*. And none will call English goods foreign now, which is the words of their gift,—Of all foreign commodities imported *intra fines regni Scotiae* : the limits betwixt the two nations are now ceased, the wall of division is broken down, and so they can be no more burdened with this merk upon the ton.

The Lords considered this struck deep ; for, by the same arguments, the Town's imposition of two pennies on the pint of ale might be quarrelled ; though they wished the Town might apply for an equivalent ; therefore they ordained it to be heard in their own presence. *Vol. II. Page 445.*

1708. *July 2.* ALEXANDER FORBES *against* CHARLES DICKSON and his FATHER.

By indentures betwixt Alexander Forbes, goldsmith in Edinburgh, and Charles Dickson, son to the provost of Forfar, in 1702, the said Charles becomes his apprentice for seven years, and is obliged to attend, and for every day's absence to serve two ; and, for every penny he skaiths his master, to repay two pennies, under the penalty of £40 Scots, over and above performance. In 1704, the boy being corrupted with bad company, he begins to dispose on some of his master's bullion, and to pawn it, and then totally deserts his service. Whereupon Forbes charges the apprentice's father for the desertion, and damage incurred thereby ; being forced to employ journeymen to do his work, to his great expense.

The father and son suspend ; and ALLEGE,—It was the master's fault, in cruelly beating him, that he ran away. And, a conjunct probation being allowed, the