

of the price ; and had begun his cutting, and furnished horses and mills for the work, and sent one Peter Stranger, a carpenter, to oversee it ; but Redford had intruded himself upon the bargain, and seized upon the timber and bark ; therefore he raises a process against him, for spuilie and damages, and executes an inhibition upon the dependance. Redford gives in a bill to the Lords, complaining, That though he had made a fair bargain for these woods, as appears by the contract of vendition produced, and the discharge of the price, at the foot of it, yet he is interrupted by Worsley, whom he knows not. And for Stranger, he offered his service and assistance, and he simply trusted him with 400 load of bark to carry to Ireland, which he never made any account of. And all they say is mere assertions, noways instructed by any writ, whereas he documents all *scripto* : and therefore craves the inhibition may be recalled, and its registration stopped, as both invidious and calumnious.

ANSWERED,—Though his agreement for the woods was only verbal, yet he offered to prove every article of it ; and that Redford came in most indiscreetly upon his bargain. And to stop inhibitions were to stop the *vena portæ et cavæ* that conveys the blood through the body politic. And inhibition uses never to be refused, except where a clear discharge is produced, or the libel offered to be redargued by the party executor his oath.

The Lords considered, that bargains for woods of so considerable a value use ever to be in writ, and parties never rely on bare communing thereanent ; and that nothing appeared on Worsley's and Stranger's side but bare assertions, without any manner of instruction in writ ; therefore they discharged the inhibition as groundless, for any thing yet seen ; but allowed them to go on in their process for proving the bargain, and liquidating the damages, as accords, where it will appear whether there was ground for serving the inhibition or not : and the damages may be heightened accordingly.

It seems Ardvorlich has been tampering with them both to screw up the price, and at last settled with Redford. *Vol. II. Page 444.*

1708. *June 22.* JOHN MORISON *against* JOHN HAMILTON.

JOHN Morison obtains a decret against John Hamilton, writer in Edinburgh, for £40 Scots, before the sheriff. He suspends, That the decret was in absence, and he only holden as confessed, and no other mean of probation against him but his oath ; and therefore craved to be reponed thereto.

ANSWERED,—The decret was stronger than when one is simply holden as confessed ; for it bore a procurator compearing for him, and himself personally present in court, and making faith, so that he might depone in the afternoon ; but he contumaciously absenting, and not daring to deny the libel, decret went out against him. *Et credendum est clerico in actibus officii*, where he asserts he was present.

REPLIED,—The decret was null ; for it bore no day assigned for his deponing : and the decerniture was *ultra petita*,—the libel being alternative, either to deliver back the papers, or pay the sum therein contained ; and yet the sheriff most iniquiously decerned him to pay. And for his alleged compearance, the same is false, and is inserted by the procurator's servants on their parole that

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