

inclined to send up a memorial to the Secretaries of State, complaining of it, that they might do their duty, whatever should be the event. This affair gave rise to sundry discourses upon the Union. *Vol. II. Page 499.*

1709. *June 4.* JOHN BURDEN *against* JAMES OLIPHANT of GASK.

THE deceased William Oliphant of Gask grants a bond to John Burden, bearing he had been his servant for several years, and it was reasonable he should not be a loser; therefore, in place of his fees and disbursements, he obliges his heirs to pay him 350 merks; and he pursuing James Oliphant, now of Gask, on the passive titles, for payment, he repeats a reduction, that it was on deathbed.

ALLEGED,—Ought to be repelled; because it is not a mere gratuitous bond, but depends upon an anterior onerous cause, his being five years immediately before his death in his service.

The Lords found the reason of deathbed relevant, as also his service; both to be proven *prout de jure*.

And the depositions of the witnesses coming this day to be advised, it was ALLEGED,—That the debtor's assertion in the narrative of the bond, bearing to be granted for services, was not probative, being a confession emitted on deathbed: and the witnesses did only prove his service, but not any paction or agreement for a settled fee; which is necessary *inter majores*; as was found, *12th February 1680, Ross against the Master of Salton*. And it is to be presumed, either there was none stipulated, or that it was paid, seeing they depone he got both board wages and clothes; and no use of payment is so much as alleged.

ANSWERED,—He has abundantly satisfied the terms of the Act, burdening him to prove his antecedent service, which he has done to a demonstration; and the Lords have ever sustained bonds though granted on death-bed, if depending on a just and necessary cause *ab ante*; as appears by the following decisions in *Dury, 7th January 1624, Shaw and Gray*; and *13th July 1632, Pollock against Fairholm*; and many times confirmed since.

The Lords first considered that, by the 83d Act, 1579, servants' fees, above three years, are prescribed, as presumed paid, unless redargued by oath, which could not be got of the heir; and therefore restricted the onerous cause to three years' service. And next, they thought 350 merks was too exorbitant a fee for that space, especially having been furnished both in meat and clothes: and they would follow the same rule they had lately done, in the pursuit, *Mr Ker against the Marquis of Lothian*, and modify it in so far as there seemed to be an *excessus*. And, therefore, modified the fee to forty pounds Scots per annum; and so brought down the bond from 350 merks to £120 Scots; and decerned for that sum. *Vol. II. Page 499.*